United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC., et al.,
Appellants,
vs.
MARSHALL TRANSPORT COMPANY,
WARREN C. MARSHALL,
REFINERS TRANSPORT & TERMINAL CORPORATION,
Appellees

Appeal from the District Court of the United States
for the District of Maryland

BRIEF FOR THE APPELLEES

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STATEMENT OF THE CASE

Marshall Transport Co., Inc., a common motor carrier under Part II of the Interstate Commerce Act and Warren C. Marshall[1] desire[2] to sell certain operating rights, truck-tractors and tank trailers and other carrier operating property to Refiners Transport & Terminal Corporation,[3] also a motor common carrier under Part II of the Interstate Commerce Act.

Accordingly Marshall Transport Co., Inc., Warren C. Marshall and Refiners Transport & Terminal Corporation filed a "BMC-44" application with the Interstate Commerce Commission asking for authority to consummate the proposed transaction under Section 5 (2)(a)(i) and Section 5(2)(b) of the Interstate Commerce Act.

A hearing was held before an Examiner of the Interstate Commerce Commission who filed a report recommending that authority for the proposed transaction be granted (R. 3). Exceptions were filed and after considering arguments and briefs, Division 4 authorized the transaction, Commissioner Mahaffie dissenting. Thereafter a rehearing by the full Commission was granted.

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[1]The truck-tractors and tank trailers and land upon which the Glen Burnie terminal is situated are owned by Warren C. Marshall and he leases such real and personal property to Marshall Transport Co., Inc. The Marshall operating rights are from Baltimore, Maryland to defined areas in Pennsylvania, Virginia, Delaware and the District of Columbia. Other than by the proposed acquisition, this territory is not served by Refiners Transport & Terminal Corporation which operates in the mid-west.

[2]The evidence is uncontradicted that Marshall Transport Co., Inc., is unable to continue successfully as a carrier as a result of its loss of its general manager and the illness of Warren C. Marshall, its chief executive and principal stockholder (R. 14). The transportation service being rendered would be lost to the public if the purchase be not approved.

[3]A history of the organization of Refiners Transport & Terminal Corporation is set forth in Appendix A hereof.

The "Report of the Commission on Reconsideration" (R. 26) decided August 3, 1943, and served August 12, 1943, determined that the application should be dismissed,[4] and on September 2, 1943, an order of dismissal (R. 35) was entered, dismissing the application.

The sole reason (R. 32) for the dismissal was that one of the party applicants is Refiners Transport & Terminal Corporation, and the application is not signed or filed by its majority[5] stockholder, Union Tank Car Company.

Suit to set aside the dismissal order was filed[6] on September 10, 1943, in the United States District Court for the District of Maryland. Arguments were heard in said Court on September 20, 1943 before the Honorable Morris A. Soper, Circuit Judge, Honorable William C. Coleman, District Judge, and Honorable W. Calvin Chesnut, District Judge. On October 16, 1943, the District Court filed its opinion setting aside the Commission's order of dismissal, Judge Soper dissenting. Final decree pursuant to the opinion was entered on November 1, 1943, from which the appeal herein was taken.

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[4]Twenty days were allowed for Union Tank Car Company to file an application if it cared to do so, but this was not done as Union did not believe it would be within the jurisdiction of the Commission.

[5]The application and record show that Union Tank Car Company owned 82.6% of the issued and outstanding capital stock of Refiners Transport & Terminal Corporation (R. 14).

[6]Suit was filed under Title 28, U. S. Code, Section 41, subdivision 28 and Sections 43, 44, 45, 46, 47, 47a and 48, and under Title 49, U. S. Code, Sections 17(9) and 305(g)(h) (being Sections 17(9) and 205(g)(h) of the Interstate Commerce Act).

OUTLINE OF STATUTORY PROVISIONS

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix of Appellants'[1] brief. Of these provisions, the one with which we are immediately concerned is Section 5(2)(a) and (b) which provides as follows:

> "(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or *for any carrier,* or two or more carriers jointly, *to purchase,* lease, or contract to operate *the properties,* or any part thereof, *of another;* or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or *for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;* • • •.
>
> "(b) Whenever a transaction is proposed under sub-paragraph (a), *the carrier or carriers* or person *seeking authority* therefore *shall present an application* to the Commission, • • •." (Emphasis supplied to indicate the clauses in issue here.)

A careful reading of paragraph (a) of Sec. 5(2) discloses that it refers to *two* distinct *types* of situations. The

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[1]The term "appellants" as herein used, refers to the United States and the Interstate Commerce Commission, unless otherwise indicated.

first type is unification, mergers, and acquisitions of control of carriers *by other carriers.* The second type is unification, mergers, and acquisitions of control of carriers by *persons not carriers.*

The same two distinct classes of cases are also recognized by subdivision (b) of Section 5(2), which says, "Whenever a transaction is proposed under subparagraph (a), the carrier * * * *or* person seeking authority therefor shall present an application to the commission * * *."

It is apparent, then, that Section 5(2)(a) and (b) distinctly deals with two types of situations, viz., those involving *carriers,* and those involving *persons not carriers.*

For *carriers,* there are three distinct classifications of permissive transactions. The first is merger or consolidation of two or more carriers. The second is that which we herein designate as the "property purchase clause" and relates to an application of any carrier or two or more carriers to "purchase, lease or contract to operate the properties" of another carrier. The third is the acquisition of control of one carrier by another carrier through stock ownership "or otherwise."

For *persons not carriers,* there are two distinct classifications of permissive transactions. The first is acquisition of control of two or more carriers by a person not a carrier through stock ownership "or otherwise." The second, hereinafter designated as the "carrier control clause," is concerned only with a person not a carrier but which has control of one or more carriers and seeks to acquire control of another carrier by stock ownership "or otherwise."

It accordingly appears that Section 5(2)(a) may be outlined as follows:

TYPE A

Where unification is effected by a carrier or carriers, there may be:

(1) Consolidation or merger of two or more carriers.

(2) Purchase, lease or contract to operate properties of another carrier

(3) Acquisition of control of one carrier by another carrier or carriers through stock ownership "or otherwise."

TYPE B

Where unification is effected by a non-carrier, there may be:

(1) Acquisition of control of *two* or more carriers by a person not a carrier through stock ownership "or otherwise"

(2) Acquisition by a person which is not a carrier and which has control of one or more carriers, of control of another carrier, through ownership of its stock "or otherwise."

STATEMENT OF THE ISSUE

Marshall Transport Company, a carrier, desires to sell its operating rights and other property to Refiners Transport & Terminal Corporation, also a carrier. Plainly the transaction falls within the property purchase clause of Section 5(2)(a) of the Interstate Commerce Act; that is, Type A (2) in the above outline.

Appellants claim that the transaction must also come within the carrier control clause of Section 5(2)(a) of the Interstate Commerce Act; that is, Type B (2) in the above outline, and that by reason thereof Union Tank Car Company must be a party applicant.

The issue here presented was succinctly stated, reviewed and disposed of by Division 4 of the Interstate Commerce Commission (Commissioner Mahaffie dissenting) as follows (R. 16-17):

> "We do not agree with protestants' contention that failure of Union to be made a party applicant herein necessitates dismissal of the application. That Union is not a necessary applicant for control authority herein is in line with our past consistent policy in such cases. *Virginia-Carolina Coach Co.—Purchase—Evans*, 1 M.C.C. 309, *Cleveland, Columbus & Cin. Highway, Inc.,—Purchase—Reo*, 5 M.C.C. 479, 36 M.C.C. 325; *Cincinnati, N. & C. Ry. Co.,—Control—Black Diamond Stages*, 15 M.C.C. 644, and *Motor Express, Inc.—Purchase—Erie Freight Lines, Inc.*, 38 M.C.C. 185. The instant transaction involves purchase by a motor carrier of properties of a motor carrier and, as such, falls directly within the permissive clause of section 5(2)(a) making it lawful 'for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another.' We are unable to agree with protestants' argument that this transaction falls

within the clause of that paragraph making it lawful 'for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise.' Much of protestants' argument is based on construing the words 'or otherwise,' which were added by the Transportation Act of 1940, as including a purchase or other unification effected by a subsidiary motor carrier of such a non-carrier 'person.' As we view it, the addition of these words was to embrace methods by which control of an additional separate and continuing carrier could lawfully be effected other than through stock ownership among the other authorized transactions. Compare *Suddarth—Purchase—Pettyjohn*, 37 M.C.C. 185. Union here controls Refiners, the motor-carrier applicant, and, following the instant purchase, it would continue to be in control of the same single motor carrier. There would be no separate additional carrier under Union's control."

SUMMARY OF THE ARGUMENT

A new policy was inaugurated by the Transportation Act of 1920.[8] Prior to that time consolidations were not exempt from the Sherman Antitrust Act or other statutes prohibiting business combinations. Such exemption was provided for by the Transportation Act of 1920.[9] Consolidations could thereafter be approved by the Interstate Commerce Commission. Perhaps the keynote of this legislation was that the Commission was directed to make an over-all plan for organization of systems. It was empowered to approve of such consolidations of carriers as would be in harmony with such a plan.

However, the 1920 Act did not provide for Commission approval of combinations effected by means other than those enumerated in the statute and did not prohibit combinations without Commission approval by such means as were not mentioned in the statute.[10] It was early held that the 1920 Act did not prohibit the use of a "holding company" as a *connecting link* between carriers. That is, a holding company could hold the stock of two or more carriers and thereby weld them effectively into one system, and the Commission had no jurisdiction over the *connecting link*, the "holding company," and was powerless to approve or disapprove the combination.

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[8]Transportation Act of 1920, C. 91, 41 Stat. 474 *et seq.*

[9]Sec. 5 (8).

[10]*Stock of Denver & Rio Grande Western R. R.* (1921), 70 I. C. C. 102.

In 1929,[11] 1930,[12] 1931,[13] and 1932[14] the Interstate Commerce Commission in its annual reports recommended that its jurisdiction be extended so as to include this *connecting link*, the "holding company."

The House of Representatives authorized[15] extensive studies which were conducted for its Interstate and Foreign Commerce Committee under the direction of Walter M. Splawn[16] as Special Counsel. The studies extended over a period of two years. The Committee held hearings and took the testimony of transportation leaders. The studies and the testimony both showed concern over means of combination, or connecting links, or mediums, particularly the "holding company," which were outside the jurisdiction of the Commission, and consequently could and were being used to thwart the Commission's over-all consolidation plan and jurisdiction. It was recommended that the *connecting link* be brought within the jurisdiction of the Interstate Commerce Commission. Such was the objective of the proposed new legislation. This purpose was accomplished by the enactment of the Emergency Transportation Act of 1933.[17]

Similar provisions for motor carriers were included as Section 213 of the Motor Carrier Act of 1935.[18]

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[11] Annual Report of Interstate Commerce Commission for 1929, page 80. See page 18 herein.

[12] Annual Report of Interstate Commerce Commission for 1930, p. 97. See Appendix B.

[13] Annual Report of Interstate Commerce Commission for 1931, p. 121. See Appendix C.

[14] Annual Report of Interstate Commerce Commission for 1932, p. 101. See Appendix D.

[15] House Resolution 114 (1929), 71st Congress, 2nd Session.

[16] Now a member of the Interstate Commerce Commission.

[17] Emergency Transportation Act of 1933, c. 91, 48 Stat. 217 *et seq.*

[18] Motor Carrier Act of 1935, c. 498, 49 Stat. 543 *et seq.*

These two statutes permitted combinations of carriers by certain prescribed methods with Commission approval, and prohibited combinations by any other methods. The effect of the statute was that the Commission could permit only such combinations as were to be accomplished in one of the methods designed by statute. All other combinations were prohibited.[19]

It was found that methods of combining other than those named in the statute of 1933 were desirable, and in 1940 the statute was amended so as to enlarge the number of permissive methods. That this was the sole purpose was expressly declared in the House Conference Report.[20] This was accomplished by the simple addition of the two words "or otherwise" to certain clauses in Section 5(2)(a) of Part I of the Act, and extending it so that it included motor and water as well as rail carriers. The corresponding section[21] of the Motor Carrier Act was repealed.

The purposes of these various amendments were expressly declared in the Congressional hearings, particularly during the hearings following the extensive two-year studies which preceded the adoption of the Emergency Transportation Act in 1933. In these hearings it was declared repeatedly that it was desired to include within the Commission's jurisdiction the *mediums* of combining. That was the purpose of the amendments made by the Emergency Railroad Transportation Act of 1933, to which the amendments of 1940 were added almost as an afterthought.

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[19]Sec. 5 (6), added to the Interstate Commerce Act by the Emergency Transportation Act of 1933.

[20]House Conference Report No. 2832, page 68. See pertinent quotation on page 26 hereof.

[21]Sec. 213.

The purpose of the legislation was not to make stockholders who owned stock in only one carrier subject to the Interstate Commerce Commission's jurisdiction. The suggestion that a stockholder of only one carrier be made subject to the Act was expressly rejected by the sponsors of the legislation.[22]

The language of the Interstate Commerce Act is in marked contrast to the Holding Company Act of 1935, enacted during the same decade and which expressly declared that it did include in its terms a pure holding company, even if that holding company owned stock in only one utility.[23] Such a holding company bill applicable to "carrier holding companies"[24] was actually proposed but failed of enactment.

In contrast to such Holding Company Act and the proposed bill, the Interstate Commerce Act has no terms extending its provisions to a stockholder owning stock in only one carrier. The plain terms of Sections 5(2)(a) and 5(3) of the Interstate Commerce Act are to give jurisdiction over a stockholder only if that stockholder is a means of connecting the carrier with another carrier. The purpose is to give the Commission jurisdiction to authorize any conceivable method of combining carriers and to prevent combinations without Commission approval.

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[22] See quotation from Commissioner Eastman's testimony on pages 21-22 hereof.

[23] Even that Act, however, provided an exemption from its terms for a corporation other than a pure holding company, that is, even the Holding Company Act did not apply to a corporation such as Union Tank Car Company which owns tangible property and carries on a business of its own. See also the discussion of Senator Wheeler's proposed "Carrier Holding Company" bill, S. 2016, at pages 30-34 herein.

[24] S. 2016, 76th Congress, 1st Session (1939).

If one carrier purchases the property of another, as is proposed here, the purchase and the ownership of the property is the tie that binds the operations together. A purchase is one of the permissive methods included in the Emergency Railroad Transportation Act of 1933, the Motor Carrier Act of 1935, and the Transportation Act of 1940. A purchase by one carrier of the properties of another does not defeat the jurisdiction of the Commission under the Emergency Railroad Transportation Act of 1933 or under the 1940 Transportation Act, and there is no occasion to endeavor to distort a simple purchase so as to bring it into one of the remedial clauses added by the Emergency Transportation Act of 1933 as amended in the 1940 Act. It is plainly within the property purchase clause.

The transaction is not within the carrier control clause. That clause does not apply unless a carrier is acquired. A carrier is defined in the statute as being a *person*,—a person engaged in transportation. Here no person, no carrier is being acquired. The subject of acquisition is only property. But one carrier continues, Refiners Transport & Terminal Corporation. Inasmuch as the Commission already has complete jurisdiction over Refiners, there is no occasion to extend its jurisdiction, and it is not desirable or legally possible for the purpose of giving the Commission jurisdiction to place it within the carrier control clause. The Commission's jurisdiction over the combined properties and the carrier operating them (*i. e.*, the purchaser) is as complete as it was prior to the purchase.

It is not reasonable that Congress intended the words "or otherwise" to bring a corporate carrier's controlling stockholder or stockholders before the Commission as a party applicant, and thus within the Commission's jurisdiction. If Congress had intended the Commission to have jurisdiction over a corporate carrier's stockholder, it

would have granted such jurisdiction explicitly and would have given such jurisdiction over all such stockholders, not, as appellants contend, over only stockholders of those carriers who seek to make acquisitions from another carrier.

Other clauses of the Act show clearly that it was not intended by Section 5(2)(a) to extend the jurisdiction of the Commission to an owner of stock of only one carrier, even though that carrier seeks to purchase the property of another carrier. Sections 204(a)(7) and 220(d) authorize the Commission to examine a controlling stockholder's records "* * * as the Commission deems relevant to such person's relation to or transactions with such carrier." Having declared jurisdiction to this extent, it is plain by familiar rules of statutory construction that the jurisdiction goes no further.

Thus, both historically and on the face of the statute, the purchase clause and the carrier control clause are both permissive, and are alternative grounds for a single application to the Commission. The carrier control clause deals with *control* of a "carrier." The property purchase clause deals with a *purchase* of "properties." On the face of the statute the carrier control clause does not apply to a purchase of properties.

The interpretation adopted by the Examiner, by Division 4, and by the District Court, is that adopted and followed by the Commission and particularly Division 4 thereof, in hundreds of cases. In fact, prior to the case at bar, no stockholder in control of a carrier had been asked to come within the jurisdiction of the Commission as a condition of granting approval of that carrier's purchase of property of another. On the contrary, a stockholder had been expressly rejected as the party applicant. If appellants' contention were sound, all of the hundreds of cases in which

a corporate carrier but not its controlling stockholder or stockholders was a party applicant, are in error and the Commission did not have jurisdiction to grant the application. Consequently, if appellants' contention were sound, millions of dollars of carrier properties have been combined illegally. Havoc has been created by the Commission's acceptance and granting of all such applications, if the appellants' contention is sound.

Furthermore, the carrier industry by appellants' contention would be denied capital to expand because investors would not buy a carrier's stock if thereby the investor would become subject to the jurisdiction of the Interstate Commerce Commission if that carrier wanted to expand by buying the property of another carrier.

The plain meaning of the statutory words, the canons of statutory construction, the underlying trend and growth of the legislation, the express declarations of Congressmen and other sponsors of the legislation, the interpretations placed upon the Act by those charged with the administration thereof, namely, Division 4 of the Interstate Commerce Commission, all show beyond doubt that the Commission had the jurisdiction and the duty to accept and act upon the application filed by the corporate carrier without an application being made by its principal stockholder. It had no authority in the case at bar to require that the stockholder of a carrier submit to the jurisdiction of the Interstate Commerce Commission as a condition of authorizing that carrier to purchase the property and operating rights of another carrier.

ARGUMENT

I.

ANALYSIS OF LEGISLATIVE BACKGROUND

(Reply to pages 28 to 35, 40 to 46 of Appellants' Brief)

The history of the Interstate Commerce Act and particularly Section 5 thereof is discussed by appellants in two different sections of their brief.[25] In reply and in supplement thereto appellees respectfully submit the following historical analysis.

A. The Transportation Act of 1920 originated policy of encouraging combinations of carriers, and began the regulation thereof.

From the time of the Transportation Act of 1920, circumstances surrounding and leading up to the enactment of Section 5(2)(a) as it now stands show that the jurisdiction of the Commission shall extend—so far as carrier stockholders are concerned—only to those stockholders forming a *connecting link* between two or more separate carriers.

In the Transportation Act of 1920, Section 5(4) provided that the Interstate Commerce Commission should promulgate a plan for consolidation of carriers into a limited number of systems. Section 5(2) provided that one carrier might lawfully acquire control of another in any manner "not involving the consolidation of such carriers into a single system for ownership and operation" whenever the Commission should find it to be in the public interest.[26]

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[25] Appellants' Brief pages 28 to 35, 40 to 46.

[26] See Sharfman "The Interstate Commerce Commission," Part III A, pages 430-474. See especially pages 438 ff.

Under this Act, in *Stock of Denver and Rio Grande Western R. R.* (1921), 70 I. C. C. 102, the Commission found itself to be without jurisdiction when a "holding company," owning all the stock of one operating carrier, sought to acquire all the stock of the applicant, likewise an operating carrier, and thus become the connecting link and medium of control of the two separate carriers. The Commission declared that the proposed acquisition of stock by the holding company "does not constitute a consolidation" within the meaning of Section 5(6), and, that inasmuch as the "holding company" is not a "carrier," the acquisition of control of the "holding company" is not within Section 5(2) which only applied to acquisition of control by carriers.

B. The subsequent extension of Interstate Commerce Commission jurisdiction was intended to include non-carriers only if union of carriers be accomplished through such non-carriers.

In referring to the Denver and Rio Grande Western R. R. decision in its Annual Report for 1929 (p. 80) the Commission said that not only was that particular transaction outside the Transportation Act of 1920, but also Section 7 of the Clayton Antitrust Act did not apply because the two carriers which had been thus connected were not competing lines. Then the Commission stated that unless these non-carrier connecting companies were brought within Section 5 by an amendment to that Section that the "carefully planned scheme of public regulation, which Section 5 was designed to accomplish, is very likely to be partially or even wholly defeated * * *." (Annual Report, 1929, p. 82.)

The Commission well illustrated the activities of these non-carrier connecting companies by the Alleghany Corporation and the Pennroad Co. Using these connecting

agencies to demonstrate what had happened under Section 5 since the Denver R. R. case, the Commission said:

> "Both of these companies • • • are *purely holding companies.* That is to say, the property which they own is not physical property but consists solely of the stocks or securities of other companies."

Then, in describing the extra-jurisdictional activities of these companies, the Commission said:

> "In other words, common control can be effected • • • by a chain, *one vital link* in which is made up of the control exercised, directly or indirectly, over two or more corporations by individuals." (Emphasis added.) Annual Report, 1929, p. 81.

The Commission concluded the matter in its 1929 annual report by a recommendation that "consideration should now be given by the Congress to possible legislation." (*Ibid* p. 89.)

Congress acted in response to this report of the Interstate Commerce Commission in 1929 by directing its Committee on Interstate and Foreign Commerce to inquire into the situation (House Resolution 114, 71st Congress, Second Session). Pursuant to this resolution, the Congressional Committee made an extensive two year investigation and made a report on February 20, 1931, designated H. R. No. 2789, 71st Congress, 3rd Session, which confirmed the need for amending Section 5 as the Interstate Commerce Commission had recommended. Here again the attention of Congress was directed to the non-carrier *connecting* company which was beyond the jurisdiction of the Commission, and which acquired control of carriers, regardless of any plan which might be adopted by the Commission. The only change needed and the only change recommended was to bring those non-carriers which con-

nected carriers under Section 5 so that the Interstate Commerce Commission might work effectively towards its goal of consolidation of carriers into systems. That was the objective pointed out to Congress and that was the setting for the subsequent amendments to Section 5 adopted by Congress. See again H. R. No. 2789, 71st Congress, 3rd Session, pp. xiv-xv.

Following this investigation and also under House Resolution 114, "A bill to amend Section 5 of the Interstate Commerce Act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes" was discussed before the Committee on Interstate and Foreign Commerce. This bill, proposing certain amendments to Section 5, was H. R. 9059, 72nd Congress, 1st Session (1932) and is set forth in Appendix E hereof. Extensive hearings were held concerning this bill.

The following quotations are taken from the record of those hearings.[27]

> "The new provisions have to do with bringing the railroad holding company, *in so far as its activities affecting consolidation are concerned*, within the jurisdiction of the Commission. That language at first, looks a little complicated, but when you study it I think you will agree, as we have all agreed, that it is rather simple and *goes directly to the object, that is, bringing the holding companies under the jurisdiction of the commission, for what purpose? Merely in so far as their activities affect the CONSOLIDATION of railroads.*" (Emphasis added.)[28]

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[27] These quotations are taken from United States Government Printing Office pamphlet 105084 entitled "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives Seventy-second Congress, First Session on H. R. 9050."

[28] Wed., Feb. 17, 1932 (page 19) Mr. Walter Splawn (Special Counsel for the Interstate & Foreign Commerce Committee, under H. R. 114, now a member of the Interstate Commerce Commission).

Commissioner Eastman, whose studies and proposals led to the legislation in question, appearing before the Committee on Interstate Commerce on February 23, 1932 (72nd Congress, First Session) H. R. 9059, in explaining the necessity for the control clause which was added to Section 5(2)(a) by the amendment of 1933, said:

> "The new paragraph (4)[29] on page 2 is a substitute for the present paragraphs (2) and (6). It proposes to authorize, under Commission supervision, every legitimate and desirable method of combining railway properties, including consolidatons, mergers, purchases, leases, operatng contracts and acquisitions of stock control of carriers by other carriers and also by a *single holding company.*
>
> "Now, that last method of acquisition by a single holding company is the only one which personally I believe is not included in the present provisions. It would not offend me if it were omitted. It was put in, and I think I was responsible for putting it in, because of the chapter in House Report No. 2789 of Professor Bonbright entitled 'Shall the Railway Holding Company Be Outlawed?' He made a good argument to the effect that union *through a holding company* might at times be desirable * * *." (Emphasis added.)[30]
>
> * * * * *
>
> "The one designated (c)[29] beginning on page 3 is a new provision. The necessity for it arises because it seemed desirable to provide in paragraph (4) for possible approval by the commission of a method of putting two or more railroads together through the *medium* of a single holding corporation. I think I said last Friday that the reason why I thought that

[29]See Appendix E.

[30]Tues., Feb. 23, 1932 (page 55) Hon. Joseph B. Eastman, Commissioner, Interstate Commerce Commission. See footnote 27 last above.

ought to be included was because Professor Bonbright in the chapter which he wrote for House Report 2789, entitled 'Shall the Holding Company be Outlawed?' made a very good argument for the use of a single holding company to bring about *a union* of railways under certain conditions.

"I question whether adequate occasion * * * for such a method could be shown *except in rare instances,* but it is conceivable that this could be shown." (Emphasis added.)[31]

These explanations on the part of Commissioner Eastman are not in accord with an interpretation of the control clause which would make it apply not "in rare instances" but in a great number of transactions coming before the Commission[32] and which would make it apply not to the case of "a single holding corporation" but back through a line of corporate investors until it should stop with some individual stockholder.

That this was deemed an important consideration by those who framed the legislation in question is apparent from Commissioner Eastman's reply to a question of Mr. Huddleston at the hearings:[33]

"Mr. Huddleston: '* * *May I ask what you would think of the effect of a provision forbidding the ownership of the stock of a carrier corporation, by another corporation and requiring that the stock be owned by individuals, and each share to have equal voting power and without power to pool or intrust it.'

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[31]Pages 59-60 of the same hearings. See footnote 27 last above.

[32]In appellants' jurisdictional statement it is said: "From an administrative standpoint also, it is important that this issue be finally determined, for an authoritative determination will affect a large number of applications now pending under Section 5 (2) (a) before the Commission."

[33]Friday, Feb. 19, 1932, page 53 of the same hearing. See footnote 27 above.

"Commissioner Eastman: 'Why, I am not prepared to recommend that, Mr. Huddleston. Of course, that goes considerably beyond what is proposed here, and I should suppose that that would interfere with the holding of stock in railroads by a good many corporations where there might be no possible objection to such holdings. It might interfere with holdings by banks, or by charitable organizations, or by strictly investment companies, and so on.'"

* * * * *

"Mr. Mapes: '* * * I want to make sure that I correctly understand what the bill tries to do. As I understand it, the Interstate Commerce Commission, under existing law, *had no control* over holding companies not common carriers, of the stock in common carriers, and this bill, among other things, *is to give the Interstate Commerce Commission control over such holding companies that acquire the control of the stock of TWO OR MORE RAILROADS.*'

"Commissioner Eastman: 'Yes, that is, the intention of the bill is to put under the jurisdiction of the commission the *combining* of railroad properties *through the medium of* a holding company. It also provides that *if such a combination through a holding company* is permited, then that holding company shall come under the jurisdiction of the commission * * *.'" (Emphasis added.)[34]

These same thoughts and purposes were again expressed by the Interstate Commerce Commission in its Annual Report of 1932, which came on the eve of actual remedial legislation by Congress. The Commission again recom-

[34] Wednesday, March 23, 1932 (page 255) Hon. Carl E. Mapes (Congressman on the Committee of the House of Representatives on Interstate and Foreign Commerce). See footnote 27 above.

mended that Section 5(2) of the Interstate Commerce Act be amended so as to—

> "(c) Provide that if *union* through a single holding company is authorized, the Commission shall have jurisdiction over the capitalization of that company and power in its discretion, to regulate its accounting, inspect its books and records, and require reports." (Emphasis added.) Annual Report, 1932, p. 101.

It was these investigations, hearings and recommendations which formed the basis and background for the legislation of 1933. Following the studies and hearings and recommendations it was declared in House Report No. 193 (73rd Congress, 1st Session), pages 19-20:

> "The investigation under House Resolution 114 (House Report No. 2789, 71st Congress, 3rd Session) discloses that an important weakness of Section 5 as it now stands is that it places no control upon the activities of so-called 'holding companies' in *effecting unification* of railway properties in a system. • • •
>
> "• • • *The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest.*" (Emphasis added.)

The result was the rewriting of Section 5 of the Interstate Commerce Act by the enactment of the Emergency Railroad Transportation Act of 1933, c. 91, 48 Stat. 217, 220.[35]

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[35] See Sharfman "The Interstate Commerce Commission" Part III-A, page 494ff.

C. The Emergency Railroad Transportation Act of 1933 accomplished the purpose of including non-carriers within the Commission's jurisdiction if such non-carriers formed a connecting link between carriers.

Significantly the 1933 Act expressly prohibited[36] all combinations of carriers except such as were accomplished by one of the means authorized by the statute. Having prohibited all other combinations, Congress deemed it desirable in 1933 to make available numerous and varied means of combining carriers, from which could be chosen the method most suitable to each particular transaction. Accordingly paragraph (2) of old Section 5[37] was repealed and in substitution therefor paragraph (4) of Section 5 was adopted.[38]

Under Section 5 as thus amended the Commission was for the first time expressly given jurisdiction of a property purchase by one carrier from another,[39] and there also appeared for the first time the two non-carrier clauses.[40]

Regardless of the method adopted for combining, Congress in 1933 intended the Commission to have complete

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[36]Section 5(4) of the Emergency Railroad Transportation Act of 1933.

[37]Section 5 of the Transportation Act of 1920.

[38]Section 5(4) as amended by the Emergency Railroad Transportation Act of 1933 provided

"* * * it shall be lawful with the approval and authorization of the Commission * * *" for "two or more carriers to consolidate or merge their properties * * * into one corporation * * *; or for any carrier * * * to purchase * * * the properties * * * of another; or for any carrier * * * to acquire control of another through purchase of its stock; (and then to remedy the situation brought about by the Denver R. R. decision, the following two non-carrier clauses appeared) or for a corporation which is not a carrier to acquire control of *two or more* carriers through ownership of their stock; or for a corporation which is not a carrier and which *has control of one* or more carriers *to acquire control of another* carrier through ownership of its stock." (Emphasis added.)

[39]See Type A, classification 2, on page 6 hereof. See discussion in note 246, page 445, Sharfman, Part III A.

[40]See Type B of outline on page 6 hereof.

jurisdiction over all the links in the combination and desired to frame its legislation accordingly. Two types of transactions were authorized by the 1933 legislation—those by carriers and those where a non-carrier would be a connecting link. Carriers were already subject to the Commission's jurisdiction and therefore it was not necessary to add any jurisdictional clause as to them. But the non-carrier connecting links prior to 1933 were not within the jurisdiction of the Interstate Commerce Commission and therefore it was necessary to include the clause[41] now known as Section 5(3) which extended the jurisdiction of the Commission to "a person which is not a carrier * * * authorized, by an order entered under paragraph (2), to acquire control of any carrier[42] or of two or more carriers." Thus, by reference to the new non-carrier control clause the jurisdiction was extended to, but only to, the non-carrier *connecting link*. The Denver Railroad case was thus ruled out by Congress. The Interstate Commerce Commission's plan for orderly unification of carriers into systems could not now be defeated, for now its jurisdiction embraced those connecting agencies which affected control of two or more carriers through stock ownership.

A substantially similar provision for combining motor carriers was included in the Motor Carrier Act of 1935 as Section 213 thereof.[43]

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[41] Section 5(3) as amended by the Emergency Railroad Transportation Act of 1933.

[42] "A person which is not a carrier * * * authorized, by an order entered under paragraph (2), to acquire control of any carrier * * *" would mean a person already controlling one carrier and seeking to acquire control of another carrier by stock ownership or otherwise.

[43] See Appendix F hereof.

D. Transportation Act of 1940 merely enlarges the number of available statutory methods for combining carriers, as evidenced by (a) House Conference Report No. 2832, and (b) Senator Wheeler's explanations.

Almost as an afterthought Section 5(4) of the Emergency Railroad Transportation Act of 1933 was changed by the Transportation Act of 1940,[44] and the words "or otherwise" were added to the non-carrier control clauses. The old Section 5(4) was renumbered as 5(2)(a).

It had been found, prior to this 1940 amendment, that other desirable methods of combining carriers were useful but could not be approved. It was in order to relieve this situation that the words "or otherwise" were added. Experience having shown that the methods of combination provided for in 1933 were not sufficient, Congress in 1940 merely increased the number of means available for putting carriers together.

That this was the sole objective of the addition of the words "or otherwise" appears from the only statement which has been found regarding this last addition. This is found in House Conference Report No. 2832, August 7, 1940, 76th Congress, 3rd Session, p. 68, where it is simply said:

> "1. Paragraph (2) is changed by adding the words 'or otherwise' in several places, so that the acquisition of control by methods other than true ownership of stock is authorized with Commission approval."

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[44]Section 5 was revised so as to make it apply to all types of carriers subject to the Interstate Commerce Act. As a necessary incident, Section 213 of the Motor Carrier Act of 1935 was repealed.

In this same connection it is important to note that Senator Wheeler, as Chairman of the Senate Committee on Interstate Commerce, after passage of the Transportation Act of 1940, which made the minor changes in Section 5(2)(a) we have before considered, asked to insert in the Congressional Record a statement[45] giving certain explanations of the amendment to the Interstate Commerce Act. In support of his request for this insertion, he observed:[46]

> "* * * I desire to have these explanations in the RECORD because I feel that they would be helpful to the Interstate Commerce Commission in interpreting various provisions of the Act."

In considering the contention of appellant that the words "or otherwise" in effect made Section 5(2)(a) into a holding company statute, the statement of Senator Wheeler assumes particular importance because Senator Wheeler was the sponsor of the Public Utility Holding Company Act of 1935, was particularly interested in holding companies, and actually did propose a bill whereby the control of carrier holding companies would have been subjected to detailed regulation by the Commission.[47] But Senator

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[45]Senator Wheeler's statement as to the 1940 amendments to Section 5 is quoted in Appendix G hereof in full, simply to show the general intent of the amendments and to show the fact that the Senator did not consider the words "or otherwise" of sufficient importance to warrant an explanation.

[46]86 Cong. Rec. 11678 (1940).

[47]The carrier Holding Company Act introduced by Senator Wheeler was S. 2016, 76th Congress, 1st Session. It expressly applied to a stockholder of only one carrier. See its definition of a "carrier holding company" as quoted in Appendix H hereof. The bill appears to have died in the Senate Committee. It closely followed the pattern of the Holding Company Act of 1935 and adopted verbatim some of its provisions. In its proposed Section 5a it would have expressly prohibited an existing railroad holding company from acquiring any interest in even one carrier, including its subsidiaries, without the prior approval of the Commission. It also would have prohibited any individual from acquiring control of a

Wheeler in his statement said absolutely nothing about the words "or otherwise." He did not consider them of sufficient importance to warrant an explanation or any comment whatsoever. Surely he would have mentioned the words "or otherwise" in his statement had they been intended to be interpreted in any such manner as appellants here contend.

If Congress in 1940 had intended to make the carrier control clause of Section 5(2)(a) as far reaching as protestants contend, it certainly would have explicitly so provided, as did Senator Wheeler's bill which failed of enactment.

Furthermore, if Congress had intended to subject an owner of stock of only one carrier to the jurisdiction of the Interstate Commerce Commission, it would have done so in a manner different than that of merely adding "or otherwise" to various clauses in Section 5(2)(a). The effect of those words, even under appellants' contention, is insufficient to accomplish that which they claim to be the Congressional objective, namely, to extend the Commission's jurisdiction to a stockholder of a single carrier. Under appellants' theory the Commission could not insist upon jurisdiction over the stockholder of a carrier. Suppose Refiners had acquired the Marshall property prior to the sale of Refiners stock to Union Tank Car Company. Under such facts the Commission admittedly would have no jurisdiction of Union under appellants' contention. Yet

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carrier or carrier holding company. The bill, moreover, contained a lengthy preamble specifically declaring its purpose to regulate and control the transactions of such holding companies. Such a preamble was no doubt considered advisable to avoid any question of constitutionality because a question had been raised as to the Congressional authority under the commerce clause of the Constitution of the United States to regulate a stockholder only. See pages 6-7 of House Report No. 2789, 71st Congress, 3rd Session.

there is as much reason for having jurisdiction under the assumed facts as there would be in the case at bar. Whether or not the Commission would have jurisdiction under appellants' contention is left entirely to the carrier and its stockholder. If the carrier does not choose to propose a purchase from another carrier, the Commission would have no jurisdiction of the stockholder. Even if the carrier proposed such a purchase, the Commission would have no jurisdiction of the stockholder if the stockholder did not choose to become a party applicant, and the purchase was abandoned. Had Congress intended to give the suggested jurisdiction it would have done so in such manner as to give jurisdiction whether or not the carrier ever sought to purchase the properties of another carrier and would not have left the matter of jurisdiction in the control of the parties. Thus it is seen that appellants' theory is unsound because it "proves" too little.[18]

So far as the history of the legislation is concerned, the express purpose of the Act was solely to plug a loophole through which two or more corporate carriers could be combined by means of a "holding company" without resorting to the Commission for approval. This was specifically announced in House Report No. 193 (73rd Congress, First Session) at page 19. (See quotation therefrom on page 23 hereof.) The aim was to bring this connecting agent (even though a non-carrier) within the jurisdiction of the Interstate Commerce Commission when it acted to form a *connecting link* between two or more separate carriers through ownership of their stock or (by the amendment of the Transportation Act of 1940) when it acted to form a *connecting link* between two or more separate carriers through any other lawful means. Sec-

[18] Appellants' theory also "proves" too much, and thereby also demonstrates that it is unsound. See discussion on page 43 hereof.

tion 5(4) as it stands today was enacted to bar the practice of combining carriers by a means which formerly was not subject to Interstate Commerce Commission approval.[49] The words "or otherwise" were not intended to convert the Interstate Commerce Act into a carrier holding company act.

E. Section 5(2)(a) of the Interstate Commerce Act differs significantly from the Public Utility Holding Company Act of 1935.

If Congress had intended Section 5(2)(a) to be mandatory, and that a stockholder of a carrier must be a party applicant when that carrier seeks to purchase another carrier, Congress would have expressed that policy more definitely, as it did in the *Public Utility Holding Company Act of 1935*.[50]

Congress in the Public Utility Holding Company Act very clearly and definitely provided, in short, that (A) "any company" owning or controlling 10% of the voting stock of *even one* public gas or electric utility company, *and* (B) "any person which the Commission determines" directly or indirectly to exercise a controlling influence over *even one* public gas or electric utility company must be subjected "to the obligations, duties, and liabilities imposed in this chapter upon holding companies." U. S. Code, Title 15, Section 79b(a)(7)(A) and (B). (Certain exceptions are considered at page 33 herein.)

The provisions of the Holding Company Act were expressly made to cover *any* company owning 10% of the

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[49]Section 5(4) provides: "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof * * *."

[50]U. S. Code, Title 15, Section 79. See Appendix I hereof.

stock of even *one* public utility and *any* other person the Securities and Exchange Commission should determine to exercise a controlling influence over even one public utility —all to be *ipso facto* within the terms of that Act. By contrast, there is no such language in the Interstate Commerce Act. Certainly, if Congress had intended the Interstate Commerce Commission to assume jurisdiction over the stockholder of even one carrier as it intended the Securities and Exchange Commission to have jurisdiction over the stockholder of even one public utility, then Congress would have expressed that intent with equal clarity in the Interstate Commerce Act. But no such provision was inserted by either the 1933 or 1940 amendments to the Interstate Commerce Act.

The differences in statutory language between the Holding Company Act and Section 5 of the Interstate Commerce Act are so sharp that we are assured that Congress recognized and desired to guard against distinctly different types of matters, and to provide entirely different types of remedies, in the field of carriers as compared to the field of public utilities.[51]

In the case of carriers the only objective of the Congressional investigations and the recommendations of the

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[51] In the case of public utilities the undesirable element was the "desire of engineering and manufacturing groups to secure control of the maximum number" of public utilities in order to "sell commodities and services" to them, and "the desire of bankers to dominate utility managements in order to secure promotion and underwriting profits" resulting in the "formation of unwieldy systems of holding companies which could not possibly be justified on grounds of engineering and managerial efficiency." See Bonbright & Means, "The Holding Company," pp. 91-93. This resulted in unsound financial structures and was followed by the practices of milking operating companies through numerous forms of contracts and arrangements. Federal Trade Commission, "Utility Corporations," 70 Congress, First Session, Senate Doc. 92, Part 73-A (1935) 61, 65. These practices have been brought in check by the Holding Company Act of 1935. See U. S. Code, Title 15, Section 79a.

Interstate Commerce Commission, as pointed out above, was to bring within the jurisdiction of the Commission the non-carrier connecting company which acted as a *connecting link* between carriers and therefore was the means of *binding together* carriers without the Commission's approval.

The position urged by protestants is in effect that the 1940 amendment made Section 5 into a carrier Holding Company Act. This would have effected a fundamental change in policy. The change in policy would have been as broad as that effected by the 1933 addition of the non-carrier provisions, and would have been a change in policy as fundamental in the carrier industry as was the Public Utility Holding Company Act in the utility field. Such a far-reaching change would not have been adopted lightly, with practically no discussion at all.[52]

Had it been the Congressional desire to inaugurate such regulation of stockholders of carriers, it would have held hearings and conducted other investigations. But it did not hold any hearings or conduct investigations concerning such stockholder in 1940 or at any other time. Even the

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[52]Before adopting any "holding company" legislation as to carriers Congress would have heeded the words of Mr. Walter M. W. Splawn, Special Counsel for the Interstate and Foreign Commerce Committee directing investigations of carrier "holding companies" under House Resolution 114 and now a member of the Interstate Commerce Committee, who said:

> "If Federal regulation of the holding company is necessary, the reasons for that necessity should be clear, the evils to be remedied should be apparent, and the scope and the limits of desired and possible Federal control should be clearly set forth. Necessary protection should be afforded, in so far as it is possible under Federal regulation, to those who would otherwise suffer *without interfering with or placing undue burden upon legitimate and desirable business activity.* Formulation of such legislation will require a comprehensive and prolonged study." (Emphasis supplied.) (House Report 2789, 71st Congress, Third Session, page LXXXVII.)

hearings and investigations conducted prior to the 1933 legislation concerned only such stockholders as held stock of two or more carriers and thereby formed a connecting link. The 1940 amendment could only have been designed to made available additional lawful methods for combining. It is not reasonable to believe that Congress intended any startling policy change in the Interstate Commerce Act to be effected by simply adding "or otherwise" to the Act in 1940,—a two-word amendment which Congress apparently did not even discuss. The words "or otherwise" must be taken to concern *only connecting companies* which are the means of tying together *two or more* carriers through ownership of their stock or through some other lawful means.

F. Even under the Holding Company Act of 1935, Union Tank Car Company would not be subject to the jurisdiction thereby conferred.

It is significant that even in the Utility Holding Company Act where the stockholder of even one public utility was within the scope of the Act, an exception is made when:

> "Such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company; * * *." *U. S. Code,* Title 15, Section 79c(a)(3).

Thus, Congress has expressly said in the Holding Company Act that it is not interested in a corporation which is only "incidentally a holding company." The Interstate Commerce Commission,[53] Congressional leaders and other sponsors of the 1933[54] and 1940 legislation also indicated they were not interest in a company which was "only incidentally a holding company."[55]

According to the findings of the Interstate Commerce Commission in the instant case, Union is only incidentally a stockholder of Refiners (R. 56). Its principal business is renting tank cars and the material part of its income is derived from that business. The conclusion must be that even if Union could be designated a "holding company" it is clearly not such a "holding company" as Congress had in mind,—even under the Public Utility Holding Company Act.

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[53]See definition of "holding company" quoted on page 18 hereof from page 82 Annual Report 1929, Interstate Commerce Commission.

[54]See quotation from Mr. Eastman's testimony on pages 21-22 hereof.

[55]See also quotation from Mr. Splawn's recommendation, footnote 52.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE CARRIER CONTROL CLAUSE DOES NOT GOVERN A TRANSACTION PLAINLY FALLING WITHIN THE PROPERTY PURCHASE CLAUSE

A. Pertinent provisions of Section 5 taken together show that a property purchase does not fall within the carrier control clause.

Refiners Transport & Terminal Corporation, a carrier, and Marshall Transport Co., Inc., another carrier, have made their application under Section 5(2)(a). The application falls squarely within the letter of Section 5(2)(a) which says that it shall be lawful "for any carrier * * * to purchase * * * the property * * * of another" carrier. The application filed by the carriers involved falls squarely within the letter of Section 5(2)(b) which says "* * * carriers * * * seeking authority * * * shall present an application to the Commission."

Appellants would have the Court ignore the property purchase clause.[56] They say that "the issue here turns * * * upon the construction of the non-carrier control clause of Section 5(2)(a)." It does not depend upon that clause alone. Neither does it depend upon the word "control" alone. The issue turns as well as upon the con-

[56] Notwithstanding that there are five distinct clauses in Section 5(2)(a)(i), appellants would ignore all of the clauses except the carrier control clause. For example, they say, (pages 19-20 Appellant's Brief): "Plainly, if a stock purchase had been involved, it could not be questioned that Union would have secured control of Marshall whether Union purchased Marshall's stock directly, or through its corporate subsidiary, Refiners." This is not correct. Section 5(2)(a), clause A-3 of outline on page 6 hereof, expressly authorizes a carrier to acquire control of another carrier by stock purchase.

struction of the property purchase clause and all pertinent words and provisions of the Interstate Commerce Act read as a comprehensive whole.

Viewed from established familiar concepts there is no internal conflict in the language of the statute and no monstrous absurdities, and it must be presumed that Congress intended the language of the Act to be construed according to its plain meaning.[57]

The words of the Associate Justice Robb are pertinent where, in speaking of another Act of Congress, he said, "In our view, the relief act is free from ambiguity, and *effect should be given to its plain terms.*" *Wilbur v. U. S. ex rel. C. L. Wold Co.* (1929), 30 Fed. (2d) 871, 872.

Appellants disclaim the plain meaning of the congressional words in the property purchase clause and seek to impose their own interpretation of the Act upon the public by suggesting a meaning which at best is hidden and which, if adopted, would create ambiguity and confusion where none in fact exists. That this has caused appellants confusion is apparent from the different theories urged in support of their contention.

When opposition first developed to the purchase of Marshall property by Refiners, it was upon the theory that the majority stockholder was the proper and only party who could make the application. Protestants said at page 5 of their brief before Division 4:

> "When the non-carrier owner of an existing motor truck concern aspired to embrace another or

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[57] *Spano v. Western Fruit Growers* (1936), 83 Fed. (2d) 150.
U. S. v. Katz (1926), 271 U. S. 354; 70 L. Ed. 986.
Crompton & Knowles Loom Works v. White (1933), 65 Fed. (2d) 132.
White v. Hopkins (1931), 51 Fed. (2d) 159.
Schroeder v. Davis (1929), 32 Fed. (2d) 454.

> several more within its domain, it, as the real party in interest, must be the one to approach the Commission for needed authority * * *. Similarly, if it be a carrier already owning another which wishes to acquire a third, it is the dominating ultimate owner of the first whose domain is sought to be extended. It therefore is the proper party in interest and is the one which should approach the Commission."

The Commission did not adopt this theory, and apparently it has now been abandoned. The position here taken by appellants is that an application for *control* under the carrier control clause must be filed by Refiners' stockholders *in addition to* the application by Refiners itself under the *property purchase* clause.[38] See pages 18-20 of appellants' brief.

There is not a word in the statute or in the history of the legislation to support any of appellants' theories. Section 5(2)(a) provides that "it shall be lawful" for one carrier to purchase the property of another carrier upon approval of the Interstate Commerce Commission or,—(note the disjunctive)—, "*or* for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through stock ownership or otherwise." And to make this meaning doubly clear, Section 5(2)(b) provides:

> "Whenever a transaction is proposed under subparagraph (a) a *carrier or* carriers *or* person seeking authority therefor shall present *an application* to the Commission * * *."

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[38] That confusion results from appellants' position is further manifested by the decision of Division 4 in *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*. See page 44 hereof.

Undeniably, the statute provides for but *one* application to the Commission—and that to be made either by the carrier *or* by the non-carrier person which proposes one of the permissible transactions under Section 5(2)(a). The statute indicates that the carrier control clause was intended as a distinct and additional method of combining two or more carriers. It was not intended to be made use of in conjunction with one or more of the other permissive clauses of Section 5(2)(a).

The author of the majority opinion of the Commission states (R. 30):

> "There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute."

See also appellants' brief, pages 19-20.

Rather than being inconceivable, this is admittedly what was done by Congress by the amendment of 1933. This amendment did not contain the words "or otherwise" and clearly activated the statute only in the case of an acquisition of control through stock ownership.

What is really inconceivable is that Congress, by addition of the words "or otherwise" in the amendment of 1940, should have intended to authorize an acquisition of property of another carrier by a non-carrier. A non-carrier could not conceivably use such property unless it itself went into the trucking business. The carrier control clause does not authorize the purchase of the *assets* of a carrier. Why should it? Take the Union Tank Car Company, for

instance. It is not proposing to acquire any property. It is not engaged in the trucking business. It has had no experience in such a business nor any facilities or personnel for carrying it on. If it were to receive the trucks or operating rights of Marshall, what would it do with them?

It is no answer to say that use can be made of the property by having a subsidiary motor carrier make a simultaneous application for authority to purchase. It is too far fetched to say that the practical application of the control clause was intended to be made dependent upon a further application under other permissive clauses of the section.

The various permissive clauses of the statute on their face are in the alternative and no one of them is made dependent upon the exercise of any other. The whole history of the control clause shows that it was intended to fill a gap in the statute which permitted two or more carriers to be combined in a common interest without any recourse whatever to the Commission for authority. A transaction where the purchase clause must also be invoked does not come within that gap.

Appellants, on pages 22-23 of their brief, attempt to inject the familiar principle that the Commission's findings on matters of fact are binding and cannot be disturbed by the courts. This principle has no application here. The Commission found no special or extraordinary facts. The record shows no relationship between Refiners and Union other than that which normally exists between a corporation and its stockholders. The Commission rested its decision solely upon the meaning which it concluded the statute itself and *Rochester Telephone Corp. v. United States*, 307 U. S. 125, give to the word "control." That is purely a legal as distinguished from a factual question.

No matter how broad were the generalities which were used to define control, they were clearly not designed to make the carrier control clause so vague and indefinite as to be meaningless, and could not have been intended to do away with fundamental corporate relationships. It surely was not intended to have a hidden meaning which would distort an ordinary purchase transaction.

Whatever may be the definition of control, it cannot change the meaning of other words in the statute, and cannot change the identity of that which is controlled, namely, a second carrier.

The carrier control clause does not apply to a property purchase, such as is here involved.

It is to be noted that in the property purchase clause the subject of acquisition is *property*, whereas in the carrier control clause the subject of acquisition is *carrier*. The distinction is fundamental. The "control" clause does not apply unless a *carrier* is the subject of acquisition.

The meaning of the word "carrier" as here used is defined in the statute itself. Section 5(13) expressly declares that as used in paragraph 2 of Section 5, the term "carrier" means a carrier subject to Part I, Part II or Part III. In each Part,[59] a "carrier" is defined as being (1) a "person" who is (2) "engaged in transportation" of one form or another. Accordingly, the carrier control clause in effect declares, considering these definitions, that it relates only to transactions in which it is proposed to acquire control of two or more *persons* engaged in transportation. To be within the carrier control clause, the subject of the proposed acquisition must be a *person* engaged in transportation.

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[59]Section 1(3)(a) of Part I, Section 203(a)(14) of Part II, and Section 302(d) of Part III.

Contrary to the claim on page 20 of appellants' brief, the use of the words "or otherwise" in Section 5(2)(a) confirms this interpretation. Borrowing the words of the Supreme Court, "* * * following a well-known rule of construction, we must rather suppose its association (that is here, the association of the phrase 'or otherwise') was intended to confine it to acts or conduct having the same purpose as its associates."[60] Applying this rule to the carrier control clause, it is to be noted that it states "it shall be lawful to acquire control of two or more carriers *through ownership of their stock or otherwise.*" The control to which reference is here made means control of *two* or more *carriers* through stock ownership or control of *two* or more *carriers*, that is, persons, by *means similar to stock ownership.*[61]

Here no control is sought over the "person" Marshall individually, or of the "person" Marshall corporation. No "person" is being acquired, consequently no carrier is being acquired, and therefore the subject of acquisition is not a carrier. There is no second carrier of which Refiners or Union Tank Car Company would have control. But one carrier continues, that is, Refiners Transport & Terminal Corporation. It follows that the proposed transaction is not within the carrier control clause.

It is apparent that Congress itself has distinguished between "properties" and "carriers" as a *subject of acquisi-*

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[60] This statement of a familiar rule of statutory construction is taken from the opinion of the Supreme Court of the United States in *U. S. v. P. R. Company*, 242 U. S. 208, 229, 61 L. Ed. 251, 264.

[61] No court decision has been found interpreting the exact phrase "* * * control * * * through ownership of * * * stock or otherwise." However, the meaning of somewhat similar clauses was determined in *Pullman Palace Car Co. v. Missouri Pacific Ry. Co.* (1885), 115 U. S. 587, 29 L. Ed. 499, 6 S. Ct. 194, and *Toledo Traction Light & Power Co. v. Smith* (1913), 205 Fed. 643.

tion, and it cannot be said that a distinction made by Congress is unduly legalistic.

Appellants' only reply is to claim (page 26 of the appellants' brief) that "the Act is concerned primarily with whether the *company to be acquired* is a carrier at the time the transaction is proposed, not whether it will be technically a carrier when the transaction has been carried to fruition." This merely begs the question. It assumes that a "*company*" is "*to be acquired.*" That is not true here. Neither *at the time of proposing the transaction,* nor at any other time, is the subject of acquisition a company or a person. No "company"—no "person"—is to be acquired. Only *property* is to be acquired here. Thus the Commission here has no jurisdiction under the carrier control clause because the subject of acquisition is property and is not a carrier at any stage of the transaction. Moreover, this proposition does not defeat the jurisdiction of the Commission under the property purchase clause. Jurisdiction under the property purchase clause does not depend upon the *subject of acquisition* being a carrier. The jurisdictional requirements of the property purchase clause are satisfied in that both the seller and purchaser are carriers.

The transaction proposed involves for transfer only "properties" and clearly falls directly within the clause relating to property purchase as found in the opinion adopted by Division 4 and the District Court.

B. Appellant's contention results in chaotic confusion.

That appellants' contention is unsound is demonstrated by the paradox that it "proves" both too much and too little.[62] If the word "control" and the statutory definitions thereof were meant to have any such meaning as appellants urge, then it is not sufficient to have only the corporate purchaser's majority stockholder join in the application. The directors would also have to join in the application because they have "actual as well as legal control."[63] In the case at bar, it is to be noticed that Messrs. Turner, Yokom, Lathrop and Crawford had worked together for years and had in fact built the business to a point where Union Tank Car Company was willing to invest its money in their enterprise.[64] They still are minority stockholders, and constitute a majority of the Board of Directors and actually manage and carry on the corporation's business. If appellants' contention were sound, this group as well as Union would have to file an application. They have "actual as well as legal control." And if the corporation had a general manager, he too should be an applicant because he would have "actual as well as legal control."

Furthermore, Union Tank Car Company is a corporation "controlled" by its Board of Directors, and that board directs the manner of voting Union's stock in Refiners. And Union's board is elected by its stockholders. And so if appellants' contention were sound, the directors

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[62]That appellants argument "proves" too little is seen from the consideration that even if appellants' theory were correct, Section 5 would be insufficient as a carrier holding company act. See discussion on pages 28-29 hereof.

[63] *Rochester Telephone Corp. v. U. S., supra.*

[64]See Appendix A hereof for history of Refiners Transport & Terminal Corporation.

of Union Tank Car Company and persons owning a majority of its stock would also have to join in the application. And if any of those stockholders were corporations, their directors and stockholders would also have to be applicants. And so on, *ad infinitum*.[65]

The confusion arising out of the position urged by appellants is further illustrated by *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*, decided January 12, 1944.[66] In offering a distinction between that case and the Commission's decision in the case at bar in the concurring majority opinion, it is explained that in the Burlington case the corporate purchaser's stockholder is a *carrier* over whom the Commission already had jurisdiction, whereas in the Refiners' case the purchaser's stockholder is not a carrier. Logically this should make no difference.[67]

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[65]See dissenting opinion of Commissioner Porter in *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*, Appendix J. hereof.

[66]The pertinent parts of the Burlington case are quoted in Appendix J hereof.

[67]The rule made by the Commission on September 17, 1943, after it had decided the case at bar makes no such distinction. The rule states: "Parties to application. If the applicant for said authority is controlled * * * within the meaning of Section 1(3)(b) of said Act, by any person or persons, each such person shall also execute and become a party to said application * * *." 8 Fed. Reg. 13193-94.

Even though the purchaser's stockholder is a carrier, the transaction under appellants' contention would constitute an acquisition of control falling within the clause of Section 5(2)(a) which makes it lawful for "* * * any carrier * * * to acquire control of another through ownership of its stock or otherwise." That transaction cannot be distinguished from the one at bar. Here the purchaser's stockholder is a non-carrier, and appellants contend that the carrier's stockholder would fall into the clause of Section 5(2)(a) making it lawful for a "person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." The two clauses are identical, except that one relates to a carrier and the other to a non-carrier. (Footnote continued on next page.)

The concurring majority opinion in the Burlington case in effect frankly explains that in the case at bar, *in order to give the Commission jurisdiction* over the purchaser's stockholder, it was necessary to interpret a property purchase as being within the carrier control clause; that is to say, the "end justified the means." The same argument is also made in Appellants' Brief, pages 22-23.

But the Commission cannot by this process extend its own jurisdiction. It is the province of Congress to confer and state the jurisdiction of the Commission. The Interstate Commerce Act gives jurisdiction over a non-carrier if that non-carrier is a connecting link between carriers. This being the limit of the Commission's jurisdiction, it cannot extend it by the distorted construction of calling a property purchase a carrier control transaction. Section 5(3) confers jurisdiction upon the Commission as a *result* of a transaction being within the carrier control clause. It is not a *reason* for a transaction being within that clause.

Appellants similarly "put the cart before the horse" on page 23 of their brief. The fact that the Commission would have some discretion under Section 5(3) as to whether or not it would exercise jurisdiction, if it had jurisdiction, does not confer jurisdiction.

Thus, whether or not the purchaser's stockholder is or is not a carrier should make no difference in the results, under appellants' contention.

Furthermore, even though the purchaser's stockholder is a carrier, it would be, under appellants' contention, controlled by its majority stockholder who would have "actual as well as legal control" of two or more carriers and who therefore should be required to be a party applicant under appellants' contention. Each one of these corporations is also controlled by its directors and executive officers who also under appellants' contention have "actual as well as legal control" of one or more carriers, and therefore all of those directors and executives should also be required to be applicants under appellants' contention if it were correct.

It is urged on page 23 of appellants' brief that "there can be no more direct or positive manner of obtaining control than by outright purchase." If Congress meant for "control" to include a "purchase," why did it provide a property purchase clause?

It is also urged on page 24 and footnote 10 of appellants' brief, that because some carriers are not incorporated they cannot be "controlled" by stock ownership, and that therefore a purchase of the properties of such carriers, must fall under the "or otherwise" provision of the carrier control clause. This assumes erroneously that such transaction must fall in the carrier control clause. Such is not the case. Congress also provided the property purchase clause, and the hypothetical case suggested in the Commission's opinion quoted in appellants' footnote 10 falls within the property purchase clause, and thereby the Commission is given full jurisdiction, as is more fully discussed on pages 60-62 hereof.

The decision of this court in *McLean Trucking Co., Inc. v. United States*, No. 31, this Term pamphlet page 14, does not support the position of appellants as claimed on page 25 of their brief. The matters there mentioned as being proper for Commission consideration are no more appropriate under the carrier control clause than under the property purchase clause. The entire transaction here proposed has been as fully submitted to the Commission under the property purchase clause, as it could be under the carrier control clause.

The property purchase proposed in the case at bar is governed by the property purchase clause alone, and as pointed out in the dissenting opinion in the Burlington case,[68] to place it within the carrier control clause leads to

[68] See Appendix J hereof.

unnecessary, illogical and unfortunate results such as those suggested above.

All the absurdities and confusion resulting from appellants' contention are avoided by accepting the property purchase clause as meaning just what it plainly says.

The law does not permit an absurd interpretation of a statute, especially where a perfectly clear and reasonable meaning is expressly set forth. "All laws are to be given a sensible construction * * *."[69]

III.

THE APPLICATION WAS FILED BY THE PROPER PARTY

(Reply to pages 37 to 47 of Appellants' Argument)

Appellants again on pages 38-39 of their brief urge the court to ignore not only the property purchase clause of Section 5(2)(a), but also pertinent words of paragraphs (2) and (4) of Section 5.

The plain words of the statute are that a property purchase is authorized by the property clause in paragraph 2(a), and the "carrier * * * seeking authority therefor" is authorized to "present an application to the Commission" by paragraph (2)(b), and any transaction proposed and consummated "as provided in paragraph (2)," is excepted from illegality under paragraph (4).

The argument of appellants is fallacious where they urge on page 39 of their brief that a stockholder of corporate

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[69] *United States v. Katz* (1926), 271 U. S. 354; 70 L. Ed. 986;
Crompton & Knowles Loom Works v. White (1933), 65 Fed. (2d) 132;
White v. Hopkins (1931), 51 Fed. (2d) 159;
Schroeder v. Davis (1929), 32 Fed. (2d) 454.

carrier purchase is illegally participating in the transaction unless that stockholder also obtains approval as if under the carrier control clause. The fallacy is exposed by the Commission's own decisions, and Congressional reenactment in 1940 of the property purchase clause exactly as it first appeared in 1933.

A. Persons charged with the administration of the Act have consistently interpreted it as holding that a corporation but not a stockholder is the proper party applicant.

Appellants are in error in stating on page 47 of their brief that the question has never been specifically raised before. In one of the many purchase applications in which were involved acquisitions by Burlington Transportation Company,[70] the question was raised as to whether or not Burlington Transportation Company should be accepted as the proper applicant. As stated in *Burlington Transportation Co.—Purchase—Hartell Truck Lines, Inc.* (1942), 38 MCC 497, 498, the Burlington Transportation Company "* * * is the wholly owned subsidiary of the Chicago,

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[70] The citations to the decisions concerning the Burlington Transportation Company are as follows:

Black Hills Stages, Inc.—Purchase—Black Hills Transportation Co. (1939), 25 MCC 171;

Burlington Transportation Co. — Purchase — Freeman Alverson (May 1940), 35 MCC 401;

Burlington Transportation Co.—Purchase—Corse (1941), 36 MCC 691;

Burlington Transportation Co.—Control—Denver Colorado Springs Pueblo Motor Way, Inc. (1941), 37 MCC 585;

Burlington Transportation Co.—Purchase—Hartell Truck Lines, Inc. (1942), 38 MCC 497;

Burlington Transportation Co.—Purchase—M. C. Foster, (1943), 39 MCC 197;

Burlington Transportation Co.—Purchase—Chicago, Burlington & Quincy R. R. Co. (January 12, 1944), 39 MCC ....

Burlington and Quincy Railroad Company which also controls, through stock ownership, the Colorado and Southern Railway Company, and, in turn, is jointly controlled through stock ownership by the Great Northern Railway Company and the Northern Pacific Railway Company." The contention that the purchaser's stockholder should have made an application was disposed of summarily as follows:

> "* * * Protestants motion for dismissal of the application on the grounds it was not made by the real parties in interest is denied."[11] (*Ibid*, p. 503.)

Also in the *Weismaster case*, 35 MCC 347, it was held by Division 4 that a corporation and not its stockholders should make the application.

As another example of the construction long and consistently placed on the Act by Division 4, which was charged with the administration of the Act, consider *System Freight Service—Merger—Yakima Valley Motor Freight*, 38 MCC 729, decided unanimously on December 4, 1942, just a few weeks before the decision of Division 4 in the case at bar. In the System Freight Service case it was found that the applicant—

> "is now controlled through ownership of 79½% of its outstanding capital stock by Sysco, Inc., a California Holding Company which has an option to purchase the remainder of the stock * * *."

Despite this express finding of control by a non-carrier *pure holding company*, no application was required from that holding company.

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[11] The matter was again raised in the *Burlington Transportation Co. —Purchase—Chicago, Burlington & Quincy Railroad Company* (January 12, 1944), 39 MCC ..., and it was again held that the carrier is the proper party applicant and that its stockholder need not file an application. See Appendix J hereof.

For other examples of the long established consistent practice of the Commission of accepting purchase applications by corporate carriers without an application by their principal stockholders, see the decisions cited in the footnote.[72]

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[72] *Transportation Co.—Control—Arrow Carrier Corp.* (1940), 36 MCC 61; see also 38 MCC 137, 48 Fed. Supp. 933, ... U. S. ..., 88 L. Ed. 358;
Virginia—Carolina Coal Co.—Purchase—Evans, 1 MCC 309;
Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo, 5 MCC 479, 36 MCC 325;
Cincinnati, N. & Co. Ry. Co.—Control—Black Diamond Stages, 15 MCC 644;
Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 MCC 185;
Eastern Michigan Transportation Corp.—Control—Eastern Michigan Transportation, 25 MCC 483;
Trek, Inc.—Control—L. & L. Freight Lines, 25 MCC 675, 35 MCC 310;
Public Service Interstate Transportation Co.—Purchase—Healy, 5 MCC 735;
Valley Public Service Co.—Purchase—C. M. & S. Transit, Inc., 25 MCC 127;
System Service—Merger—Yakima Valley Motor Freight, 38 MCC 729;
Cincinnati & Lake Erie Transportation Co.—Purchase—King Bros., 15 MCC 447;
Motor Express & Terminal Corp.—Purchase—Arcade Freight Lines, Inc., 15 MCC 793;
Atlantic Greyhound Corporation—Purchase—Neel Gap Bus Lines, Inc. (1941), 37 MCC 784;
Days Transfer, Inc.—Purchase—Charles Delos Haner (1943), 39 MCC 339;
Pioneer Express Co.—Purchase—J. A. Henard, 15 MCC 659;
Ziffrin's Overnite Express, Inc.—Purchase—Overnite Express Inc., 5 MCC 246;
Penn. & Ohio Coach Lines Co.—Purchase—Cadiz Bus Line Co. (H. E. Dutt, Rec.), 5 MCC 382;
Motor Transport Co.—Purchase—Edward Jansen, 5 MCC 570;
Consolidated Bus Lines, Inc.—Purchase—Cheroke Motor Coach Co., Inc., 5 MCC 106;
Brooks Transportation Co., Inc.—Purchase—Jacobs Transfer Co., 5 MCC 85;
The Utah Idaho Central Railroad Corporation—Control—Messinger Truck Line, Inc., 39 MCC 25.

The matter was ably expressed in the dissenting opinion of Commissioner Porter, which was written when this case was decided by the full Interstate Commerce Commission on August 3, 1943, and in which he said (R. 33):

> "* * *Thus for more than seven years we have decided hundreds of applications like the instant one without the majority stockholder of the purchaser being a party applicant; but suddenly the majority penalize this particular purchaser for following the procedure which we ourselves long since established. *Virginia-Carolina Coach Co.—Purchase—Evans,* 1 MCC 309, *Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo,* 5 MCC 479, 36 MCC 325 * * *.
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> "In the second case above cited, on reconsideration, the Commission approved the application without requiring the signature on the application of that purchaser's sole stockholder, U. S. Truck Lines, Inc., or the latter's majority stockholders, Standard Carloading Corp., or that company's three stockholders * * *, or the stockholders of each of those three companies * * *. Yet, in approving the purchase there proposed, full cognizance was taken of all links in that chain. * * *"

Such a settled or uniform administrative construction of a statute is of a great weight in determining its meaning.[13]

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[13] *Boston & Main R. R. v. Hooker,* 233 U. S. 97; 34 S. Ct. 526;
Pocket Veto Case, 279 U. S. 655, 688, 689; 49 S. Ct. 463; 73 L. Ed. 894;
Louisville & Nashville R. Co. v. U. S., 282 U. S. 740; 51 S. Ct. 297; 75 L. Ed. 672;
New York, N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361, 401; 26 S. Ct. 272; 50 L. Ed. 515;
New York, N. H. & H. R. Co. (1932), 287 U. S. 178, 190; 53 S. Ct. 106; 77 L. Ed. 248.

B. Appellants' contention would make uncertain title to all property heretofore purchased by a corporate carrier from another carrier.

In the case at bar there is particular reason for giving serious consideration to the significance of hundreds of decisions of the Commission under the Emergency Railroad Transportation Act of 1933 and Section 213 of the Motor Carrier Act of 1935.

Both the 1933 Emergency Railroad Transportation Act and the 1935 Motor Carrier Act prohibited[74] a person having control of one carrier from acquiring control of another carrier, except by a method authorized by the statute, *i. e.*, except by stock ownership. In other words, under the 1933 and 1935 statutes, there was only *one* lawful way that a carrier's stockholder could acquire control of another carrier,—that was by stock ownership.[75]

According to appellants' contention, there are now as a result of the 1940 amendment at least *two* lawful ways that a carrier's stockholder may acquire control of another carrier; (1) by ownership of its stock, and (2) "or otherwise." Appellants' claim is that the transaction in the case at bar falls within the latter classification of acquisitions of control, which classification, they say, was first made lawful in 1940.

It will be seen at once, however, that the nature of the transaction has not changed; if the instant transaction amounts to an acquisition of control since 1940, the same transaction has *always* been an acquisition of control, and constituted an acquisition of control prior to 1940. That

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[74]Section 5(6) of the Emergency Railroad Transportation Act of 1933 and Section 213(b)(1) of the Motor Carrier Act of 1935.

[75]Section 5(4) of the Emergency Railroad Transportation Act of 1933.

is to say, that if a purchase by a corporate carrier of another carrier's property has given the majority stockholder of that purchaser control of another carrier since 1940, it had exactly the same effect before 1940.

But prior to 1940 the corporate purchaser's stockholder could not be authorized to acquire such control, because prior to 1940 the words "or otherwise" were not in Section 5(2)(a)[76] It follows that under appellants' contention, a purchase of another carrier's property by a corporate carrier could not have been authorized prior to 1940 even under the property purchase clause. This is true because such purchase under appellants' contention, would have given the purchaser's stockholder a control over another carrier, which the Commission could not have authorized prior to 1940.

Thus, under appellants' contention, ever since 1933 it has been improper for the Commission to grant any corporate purchaser authority to purchase the property of another carrier. Prior to 1940 the grant of such authority was improper because thereby under appellants' contention the majority stockholder of the purchaser was granted authority to acquire control of another carrier, and prior to 1940 the Commission had no jurisdiction to grant such control. After 1940 the Commission did not have jurisdiction, under appellants' contention, to grant authority for such purchase because the corporate purchaser's stockholder was never required to be a party applicant to the

[76]The Commission has held repeatedly that it cannot authorize such transactions as are not within the permissive provisions of former Section 213 or present Section 5(2)(a). See *Evansville & O. V. Ry. Co.—Purchase—Evansville & O. V. Ry. Co., Receiver*, 35 MCC 13; *Trek, Inc.—Control—L. & L. Freight Lines*, 25 MCC 675; *Trek, Inc.—Control—L. & L. Freight Lines*, 35 MCC 310; *Weimaster case*, 35 MCC 347; *Hankinson—Purchase—Commercial Freight Lines, Inc.*, 35 MCC 385; *Service Tank Lines and Steele—Control—Consolidated*, 35 MCC 193, 198.

purchase application prior to the decision of the Commission in the case at bar. Thus, it is seen, if appellants' contention were sound, it would render void all of the hundreds of purchases by corporate carriers of the property of another carrier which have been authorized and consummated since 1933. Plainly, to hold appellants' contention to be sound would raise havoc with the title to thousands of dollars worth of properties thus purchased.

Had appellants' contention been deemed correct by the Commission, it would have denied all applications by corporate carriers for authority to purchase the property of another carrier. But such applications were not denied. Accordingly it appears that the Commission did not deem appellants' contention to be sound, and in effect rejected appellants' construction of the Act. In other words, it did not interpret a corporate carrier's purchase of property from another carrier under the property purchase clause as giving the purchaser's majority stockholder control over the vendor carrier. The legislature is presumed to know the construction thus placed upon the property purchase clause.

C. Appellant's contention is not supported by normal rules of statutory construction.

Appellants say on page 18 of their brief that it is not their claim that the carrier control clause supersedes the property purchase clause. Whether or not appellants so assert, the inevitable result of their position is that the carrier control clause would in effect supersede and cut down the property purchase clause. Under their contention no corporate carrier could purchase property from another carrier unless the purchaser's stockholder would subject itself to the jurisdiction of the Commission by making an application under the carrier control clause.

Therefore the jurisdiction of the Commission under the property purchase clause is cut down to those cases where the corporate purchaser's stockholder is willing to submit to the jurisdiction of the Commission by making an application under the carrier control clause. This is a very definite limitation upon the jurisdiction of the Commission under the property purchase clause. If as in the case at bar the corporate purchaser's stockholder fails to submit to the jurisdiction of the Commission, the corporate carrier is effectively barred from purchasing the property of another carrier. Thus it is seen that under appellants' contention the carrier control clause would supersede the property purchase clause to the extent indicated, and the property purchase clause is thereby cut down.

The property purchase clause first appears in its present form in the Emergency Railroad Transportation Act of 1933. Substantially the same clause was made a part of Section 213 of the Motor Carrier Act of 1935. The same property purchase clause was re-enacted and kept as a part of Section 5(2)(a) by the Transportation Act of 1940. The legislature being presumed to know the prior construction of the property purchase clause, upon repeating in the amendments of 1935 and 1940 the words that had been thus previously construed, adopted the prior construction. Sutherland's "Statutory Construction" 3rd Edition, Volume 1, pages 428-429, and cases cited in Note 9 thereof.

The property purchase clause language remains the same. Congress could have, but did not, change the words of the property purchase clause. To hold that the property purchase clause had been changed by the addition in 1940 of the word "or otherwise" to the carrier control clause, would be to find an amendment by implication. Amendment or repeal by implication is not favored.

Sutherland "Statutory Construction" (1943) 3rd Edition, Volume 1, Section 1913, and cases there cited.

> "Where an amendment leaves certain portions of the original act unchanged, such portions are continued in force, with the same meaning and effect they had before the amendment * * * (and) * * * where a statute purports to amend a designated clause of an existing statute, it will be presumed that such clause is the only one to which the legislature intended the amendment to apply."[77]

Furthermore, one of the simplest canons of statutory construction is that a qualifying clause is to be restrained to the last antecedent unless the subject matter requires a different construction (which can hardly be seriously urged here). *Puget Sound Electric Ry. et al. v. Benson* (1918), 253 Fed. 710, 711; 165 C. C. A. (9) 304; *Cushing v. Worrick* (1857), 9 Gray (Mass.) 382; *Ellis v. Murray* (1854), 28 Miss. 129; *Fowler v. Tuttle* (1851), 24 N. H. 9; *Gyger's Estate* (1870), 65 Pa. St. 311. The words "or otherwise" were added to the carrier control clauses only.[78] They were not added to the property purchase clause,[79] and cannot be taken to modify or affect that clause in any manner.

These rules of statutory construction confirm the fact shown by the history of the legislation that Congress never intended to give the Commission jurisdiction over a non-

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[77] *59 C. J.* 1097.

And see:

Huff v. Fetch, 143 N. E. 705, 194 Ind. 590;

Thompson v. Mossburg, 139 N. E. 307, 141 N. E. 241, 193 Ind. 566;

Whipple v. Christian, 80 N. Y. 523 (affirming 15 Hun. 321);

Bonnell v. Griswold, 80 N. Y. 128 (affirming 1 Hun. 332);

People v. Jefferson County Canvassers, 28 N. Y. S. 871, 77 Hun. 372;

Healy v. Wheeler, 72 A. 753, 75 N. H. 214.

[78] Type B on page 6 hereof.

[79] Clause 2, Type A, on page 6 hereof.

carrier who was not a connecting link between carriers. Congress did not intend and the statute does not require an application other than from the corporate carrier purchaser.

D. To refuse to accept Refiners Transport & Terminal Corporation as proper party applicant is to ignore that a corporation is a separate entity.

Union Tank Car Company is involved in the proposed transaction in only such manner as any stockholder is involved in the corporation's affairs. This being so, it accordingly follows that notwithstanding the argument on page 19 of their brief, appellants' contention in effect is to depart from the fundamental concepts of a corporation, and to disregard it as being an entity separate from its stockholders. This creates confusion and leads to results, the end of which cannot be foreseen as is hereinbefore pointed out. All of this is avoided by giving the usual and customary recognition to the corporate form when adopted by a carrier. The whole Interstate Commerce Act recognizes that a carrier may be, and in a majority of cases (especially as to railroads) is, a corporation.

Respect for the corporate entity is the ordinary, natural, reasonable legal approach to a situation involving corporations.[80] Even where substantive as well as jurisdictional issues are involved, it is generally held that neither ownership of a majority, or even all, of a corporation's stock, nor common officers, nor interlocking directorates, make a subsidiary the *alter ego*, or the agent of the sole or princi-

[80]See the *Toledo Traction, etc. v. Smith* (1913), 205 Fed. 643.

pal stockholders,"[81] and in *Fletcher's Cyc., Corp.*, Permanent Ed., Vol. 9, page 300, Sections 4468-9, it is said:

> "In nothing is the distinctness of the corporation from its members and officers more marked and emphasized than in the determination of parties. They are not parties by reason of its being one. * * * If the cause of action belongs to the corporation, it should sue; and neither officer, stockholder or creditor as such * * * can bring suit * * *.
>
> "The corporation is the sole plaintiff on all contracts running to it as the sole promisee * * *."

This general rule that a corporation alone is a proper party applicant has been expressly declared and followed,

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[81] *Pullman Palace Car Co. v. Mo. Pac. Ry. Co.* (1885), 115 U. S. 587; 29 L. Ed. 499;
Hazelton Corporation v. General Electric Corp. (1937), 19 Fed. Supp. 898;
Cleveland Trust Co. v. Consolidated Gas, etc. (C. C. A. 4th 1932), 55 Fed. (2d) 211;
Mas v. Nu-Grape Co. of America (C. C. A. 4th 1932), 62 Fed. (2d) 113;
Burnett Commissioner v. Riggs National Bank (C. C. A. 4th 1932), 57 Fed. (2d) 980;
Duffy v. Freide (C. C. A. 4th 1935), 75 Fed. (2d) 17;
Majestic Co. v. Orpheum Circuit (C. C. A. 8th 1927), 21 Fed. (2d) 720;
American Cyanamid Co. v. Wilson (C. C. A. 5th 1931), 51 Fed. (2d) 665;
Cannon Mfg. Co. v. Cudahy Packing Co. (1924), 267 U. S. 333, 69 L. Ed. 634;
U. S. v. Elgin R. R. (1935), 298 U. S. 492, 80 L. Ed. 1300;
Burnett Commissioner v. Commonwealth Improvement Co. (1932), 287 U. S. 415, 77 L. Ed. 399;
Sloan Shipyards Corp. v. U. S. Shipping Board (1922), 258 U. S. 549, 66 L. Ed. 762;
McLean v. Goodyear Tire & Rubber Co., Inc. (1936), 85 Fed. (2d) 150;
Leaman Transportation Company, Inc., Contract Carrier Application, 34 MCC 73;
Lee Wilson & Co. Contract Carrier Application, 29 MCC 525.

not only in proceedings before the Interstate Commerce Commission,[82] but also before other commissions.[83]

There is nothing in the Interstate Commerce Act which would indicate that Congress intended to depart from this traditional view of the corporation and have its stockholder as well as the corporation make an application. On the contrary, the Act indicates that Congress was well aware of corporate structures and of stockholders' importance. Congress appropriately provided in Section 204(a)(7) and Section 220(d) of Part II of the Interstate Commerce Act that the Commission does have certain powers with reference to stockholders controlling carriers. For example, the Commission is given express authority to inquire into the management of the business of persons controlling a motor carrier and to examine such persons' books.[84]

Such provisions, so far as they relate to stockholders controlling purchasing motor carriers, would have been unnecessary if the control clause of Section 5(2)(a) were to be interpreted as protestants now urge. These provisions do make it clear, however, that in any proposed transaction such as the purchase of one carrier by another carrier, the Commission has full authority to investigate and determine all pertinent facts relating to any stockholder controlling the applicant.

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[82] *Weismaster case*, 35 MCC 47;
Burlington Transportation Co.—Purchase—Hartelt Truck Lines, Inc. (1942), 38 MCC 497.

[83] A corporation and not its principal stockholder was recognized as being the proper party applicant before other Commissions in *Georgia S. & F. Ry. Co., et al., v. Georgia Public Service Commission* (1923), 289 Fed. 878; *Toledo Traction etc. Co. v. Smith*, 205 Fed. 643, 672; *Illinois Bell Telephone Company v. Moynihan*, 38 Fed. (2d) 77, 80, reversed on other grounds in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133, 75 L. Ed. 255, but see discussion of Headnote 2.

[84] Sections 204(a)(7) and 220(d) which are quoted in Appendix K hereof.

IV.

THE DISTORTED CONSTRUCTION OF SECTION 5(2)(a) URGED BY APPELLANTS WOULD ACCOMPLISH NO MERITORIOUS PURPOSE AND WOULD DO IRREPARABLE HARM

The motive for straining to place the transaction in the carrier control clause, when obviously it falls directly within the property purchase clause, is thereby to enlarge the Commission's jurisdiction. Not only is this overreaching, illegal and unauthorized, but it accomplishes no meritorious purpose.

The jurisdiction which the Commission is reaching for is that conferred by section 5(3). Out of the provisions there enumerated, appellants concede on pages 22 and 45 of their brief that only Sections 214 and 204(a) could possibly be of any interest in the case at bar.

Analyzing the provisions of these sections it appears that the additional power thereby conferred would have no usefulness whatsoever in the situation here presented.

Section 214 gives the Commission jurisdiction over the issuance of securities. The Commission already has jurisdiction over the stock and other securities of the carrier here involved, that is, Refiners Transport & Terminal Corporation, and therefore has complete and extensive authority to control the securities and the finances of the carrier business. The Commission has no legitimate interest in any other securities.[85]

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[85] As a matter of fact, it is common knowledge that the stock of Union Tank Car Company (the majority stockholder of Refiners Transport & Terminal Corporation) is listed on the New York Stock Exchange and is subject to the jurisdiction of the Securities and Exchange Commission. If the Interstate Commerce Commission by nebulous reasoning were seeking to get control of the securities of Union Tank Car Company, it would be attempting to encroach on the authorities now being exercised by the Securities and Exchange Commission.

Section 204(a), the other of the provisions last above mentioned, makes it the duty of the Commission to regulate common carriers by motor vehicle and authorizes the establishment of:

> "Reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."[11]

It is inconceivable how any such requirements as the Commission could make under this section as to the conduct of the motor carrier business could be better enforced if Union as the carrier's majority stockholder was made subject to the Commission's jurisdiction. Of the matters enumerated in this section the only ones of any possible pertinency here are accounts, records and reports. But obviously no good purpose would be served by any attempt to make the books of account of a tank car business conform to a uniform system of accounts, records and reports, and preservation of records, designed and suitable for only a motor carrier business. That it would be impracticable to try to force any business other than that of a motor carrier to conform to an accounting system designed for a motor carrier is self-evident, and is recognized by the Commission itself in its recent decision rendered in *The Utah Idaho Central Railroad Corporation—Control—Messinger Truck Line, Inc.*, 39 M.C.C. 25.

Furthermore, even though the majority stockholder files no application, its books and records are subject to examination by the Commission by virtue of the terms of Sections 204(a)(7) and 220(d).[11] Also, even aside from any

[11] See Appendix K hereof.

statute the Commission could under suitable circumstances subpoena the records of the carrier's majority stockholder as was done in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 35 S. Ct. 645, 59 L. Ed. 1036.

Therefore, it is apparent that no good is gained by the specious reasoning necessary to place the transaction in the carrier control clause.

Such an interpretation as is urged by appellants would, in fact, grievously affect the transportation business. In the first place, a carrier, either rail, motor or water, could not purchase the operating rights or other property of another carrier unless the person or persons who owned a controlling interest of its capital stock were willing to subject himself or themselves to the jurisdiction of the Interstate Commerce Commission by becoming party to an application for authority to consummate the purchase. The inconvenience and impracticability of such a situation is realistic in the case of a large railroad having hundreds of stockholders. That it is an absurd result is apparent in the case of a small corporate motor carrier whose stock is owned perhaps by a man and by his wife. Perhaps her sole assets are her household goods. It is absurd to require a financial statement and an income statement from such a housewife, such as are required by the Commission from every applicant in a finance proceeding. Such inconvenient and unnecessary requirements would greatly hinder the normal growth of the transportation industry.

But even more serious than the inconvenient and unreasonable results which follow from appellants' contention, is the discouragement resulting therefrom to investors who might overwise put capital to work in the transportation industry. A stockholder might be faced with the choice of submitting himself to the Interstate Commerce Commission's jurisdiction or preventing the corporate carrier in

which he owned stock from purchasing operating rights or other property from another carrier. Rather than place himself in such a situation an investor would refuse to put his capital in the transportation industry. The motor carrier business is comparatively new and is in need of capital. Its future development and growth would be very seriously impaired if appellants' contention were to be adopted.

The importance of this is even greater when it is realized that it would require any stockholder, even an insurance company or a trust company or a bank, who owns stock in a carrier to come before the Commission if that carrier wished to purchase property of another carrier. In *Triangle Securities Trust, etc.—Control—Georgia Stages, Inc. Purchase—St. Andrews Bay Transport Co.*, No. MCF-2119, 4 Fed. Carriers Case, ¶30,703, decided December 21, 1943, Division 4 of the Commission refused to accept the purchase application until the corporate purchaser's stockholder, a finance company, submitted to the jurisdiction of the Commission, under the rule announced by the Commission in this case.

CONCLUSION

Thus it is seen that appellants' contention would be of no benefit as a regulatory means and would do immeasurable harm in the transportation industry. In the case at bar, the transaction proposed is a purchase by one carrier of the property of another carrier. The proposal falls directly within the property purchase clause. The plain words of the property purchase clause should not be ignored but should be recognized and the application accepted and acted upon as filed by the carrier, Refiners Transport & Terminal Corporation. There was no occasion whatsoever to dismiss the application for lack of a proper party applicant. The judgment of the District Court should therefore be affirmed.

Respectfully submitted,

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Dated: March 17, 1944.

APPENDIX A

HISTORY OF THE ORGANIZATION OF REFINERS TRANSPORT & TERMINAL CORPORATION

The history of Refiners and its personnel is set forth in 36 M.C.C. 789, and in the transcript of testimony taken by the Examiner of the Interstate Commerce Commission (107, 108, 119, 122, 123, 154-158) as follows:

Refiners Transport & Terminal Corporation is a Delaware corporation organized September 24, 1940 for the purpose among others, of effecting reorganization of the motor transportation business conducted by the Overland Transportation Corporation, a corporation engaged in interstate commerce in Michigan since 1930; Petroleum Transit Corporation which has engaged in intrastate commerce in Ohio and Illinois since October 1936 and in interstate commerce since February 1938; and Petroleum Haulers, Inc., a corporation engaged in intrastate commerce in Ohio and Indiana since October 1937. Refiners was brought about by the stockholders of the three corporations named which had common stockholders and management (107, 108). On November 1, 1940 Refiners acquired all of the outstanding capital stock of the predecessor corporations through exchange of 31,897½ shares of its own capital stock. Refiners also caused a new corporation United Transport Corporation to be incorporated October 29, 1940 and bought ten shares of its capital stock having a par value of $100.00 for $1,000.00 cash. That corporation has never actively engaged in business.

On November 7, 1940 Union Tank Car Company acquired from Refiners' stockholders 12,900 of the 31,897½

shares of the stock previously issued in exchange for stock of the subsidiaries and acquired from Refiners 4,800 additional shares for $56,000 cash (122, 123). On January 15, 1941 Union Tank Car Company acquired additional shares of Refiners for $133,025, thereby acquiring direct control of Refiners (122). Refiners began transportation operations in intrastate commerce on March 1, 1941, when it took over the business of Overland.

Pursuant to orders entered February 24, 1941 in Nos. MC-FC-14544 and MC-FC-14544A, Refiners took over Petroleum Transit's certificate of public convenience and necessity authorizing Refiners to engage in interstate commerce as a motor vehicle common carrier (119). Refiners has been engaged in interstate commerce since April 25, 1941. Overland Transportation Corporation and Petroleum Transit Corporation have been dissolved (119). Petroleum Haulers, Inc., is a wholly owned subsidiary operating intrastate in the State of Indiana (119).

Pursuant to order entered June 30, 1941 in MC-F-1536, reported in 36 MCC 789, Refiners issued 50,000 additional shares of its capital stock to Union Tank Car Company thereby increasing its holdings to 82.6% of Refiners' outstanding stock (124). After the acquisition of stock by Union Tank Car Company the management of the transportation companies was left to the same people who had managed the business of the predecessor companies, namely, Messrs. Turner, Yokom and Lathrop (112).

The officers of Refiners Transport & Terminal Corporation are E. S. Turner, President, Charles J. Yokom, Vice President, Charles F. Lathrop, Secretary and Assistant Treasurer, and Fred L. Crawford, Treasurer (110).

The directors of Refiners are E. S. Turner, C. F. Lathrop, F. L. Crawford, B. C. Graves, and C. J. Yokom (111).

Messrs. Turner, Yokom, Lathrop and Crawford, who are officers and constitute four of the five directors of Refiners, were all officers and directors of all the predecessor corporations. The predecessor corporations had common stockholders, officers and directors (107, 110, 117, 118, 122, 154-158, see also MC-F-1536, 36 MCC 789).

Mr. Turner has been in the transportation business for about 30 years, 10 of which were in the transportation of petroleum products (108-109). He retains about 20% of the stock of Turner Cartage and Storage Company, a company engaged in the business of carting and erecting heavy machinery in and about Detroit. He does not have any part of the active management of that corporation, and it is not in any way connected with Refiners Transport & Terminal Corporation and does not operate in interstate commerce (109).

Mr. Crawford does not take any active part in the management of the corporation. He is not interested in any other transportation company. Mr. B. C. Graves is Vice President and director of the Union Tank Car Company. Although Refiners has directors' meetings scheduled for once a month, they are not held regularly (111). Neither Mr. Graves nor Mr. Crawford takes an active part in the management of Refiners Transport & Terminal Corporation, and its business is conducted in substantially the same manner as it was before the organization of Refiners Transport & Terminal Corporation (112).

Refiners does not have directors or officers common with Union Tank Car Company except for Mr. Graves, who is director of Refiners and also officer and director of Union Tank Car Company. No corporation other than Union Tank Car Company has any stock ownership in Refiners. Refiners does not have common directors or officers with any carrier corporations other than Petroleum Haulers,

Inc., and United Transport Corporation. E. S. Turner and H. J. Turner hold as voting trustees 6.3% of the stock of Refiners. The stock held as voting trustees is held for the benefit of Cora Turner, H. J. Turner and Grace Priebe.

APPENDIX B

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1930

Recommendation

"8. That consideration be given by the Congress, in the light of such facts as may be disclosed by the investigation of the Committee on Interstate and Foreign Commerce (H. R. 114) which is now in progress, to possible legislation providing for public regulation in certain respects of so-called holding companies which may or do control carriers by railroad subject to our jurisdiction" (p. 97).

APPENDIX C

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1931

Recommendation

"9. That section 5 (2) of the Interstate Commerce Act be amended so as to bring the jurisdiction of the commission for approval or disapproval any acquisition of the

control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding companies or otherwise; and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the Commission. * * *" (p. 121).

APPENDIX D

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1932

"*Group I*

Recommendations for Legislation

"7. That section 5(2) of the Interstate Commerce Act be amended so as to

(a) Authorize, under Commission supervision, *every legitimate and desirable method of combining* railway properties, including consolidations, mergers, purchases, leases, operating contracts, and acquisitions of stock control of carriers by other carriers, and also by a single holding company.

(b) Prohibit every other means of bringing railroad companies under common control or management in a common interest, however such result is attained.

(c) Provide that if *union through a* single holding company is authorized, the Commission shall have juris-

diction over the capitalization of that company and power in its discretion, to regulate its accounting, inspect its books and records, and require reports.

(d) * * *" (p. 101). (Emphasis added.)

APPENDIX B

H. R. 9059, 71st Congress, 1st Session (1932):

"A BILL To amend section 5 of the Interstate Commerce Act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the interstate commerce act, as amended (U.S.C. title 49, sec. 5), is amended by striking out paragraphs (2) and (3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively.

Sec. 2. Such section is further amended by striking out paragraphs (6), (7), and (8) and by inserting lieu thereof the following paragraphs:

"(4) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more carriers, to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or moe carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through

ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock:

"(A) The proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and shall be approved by the commission.

"(B) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this paragraph, the carrier or carriers or corporation seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing.

If after such hearing the commission finds that the public interest will be promoted by the transaction proposed and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe.

"(C) Whenever a corporation which is not a carrier is authorized, by an order entered under subparagraph (B) of this paragraph, to acquire control of any carrier or two or more carriers, such corporation thereafter shall, to the extent povided by the commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations

of such paragraphs, be considered as a common carrier subject to the provisions of this act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), * * * be considered as a 'carrier' * * *."

APPENDIX F

Motor Carrier Act of 1935, Section 213(b)(1):

"It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof."

APPENDIX G

Senator Wheeler's explanation of the importance of the amendments to Section 5 by the Transportation Act of 1940. Congressional Record, Vol. 86, p. 11678, 76th Congress, 3rd Session (1940):

"Pooling and Consolidations

"The provisions of the conference substitute governing pooling and consolidations, mergers, etc., of all carriers are in Section 7, amending Section 5 of the Interstate Commerce Act. These provisions follow generally the provisions of Section 10 of the Senate Bill as to pooling, and of section 49 of the Senate bill as to unifications of carriers. The pooling provisions in amended Section 5, paragraph 1, cover all carriers subject to the act. The conference substitute here differs from the Senate bill, in which the pooling provisions related only to carriers by railroad or water.

"The principal change in existing law on consolidations is the repeal of provisions requiring the Commission to prepare and adopt a general consolidation plan. Section 213 of the Motor Carrier Act, which related to unifications of motor carriers, is repealed and the law governing all consolidations of carriers subject to the act is covered by the amended Section 5 of the Interstate Commerce Act.

"Present law is also amended by inclusion of the Harrington amendment, protecting employees in the event of consolidations and by directing the Commission to give weight to the following questions when passing upon any proposed transaction; first, the effect upon adequate transportation service to the public; second, effect upon the public interest of the inclusion, or failure to include, other

railroads in the territory involved; third, the total fixed charges; and fourth, the interest of the carrier employees affected. The Commission is also instructed not to approve any consolidation, merger, etc., which contemplates a guaranty of dividends, except upon a specific finding that such guaranty is not inconsistent with the public interest."

APPENDIX H

Section 5a(2)(a) of Senator Wheeler's Proposed Carrier Holding Company Bill S. 2016, 76th Congress, First Session 1939, which failed of enactment, provided:

"(2) (a) As used in this part, the term 'carrier holding company' means a company (other than a company the principal business of which is that of a carrier) which—

"(A) holds with power to vote, owns, or controls 10 per centum or more of the outstanding voting securities of a carrier or of a company which is a carrier holding company by virtue of this subparagraph (a), unless the Commission, as provided in subparagraph (b), by order determines such company not to be a carrier holding company; or

"(B) controls, directly or indirectly, alone or pursuant to an arrangement or understanding with one or more other persons, by stock ownership, lease agreement, or voting trust, by common officers, directors, or stockholders, by reason of circumstances or methods surrounding organization or operation, or by any means whatsoever, a carrier or a company which is a carrier holding company by virtue of this subparagraph (a)."

APPENDIX I

Section 79a of the Public Utility Holding Company Act of 1935 (U. S. Code, Title 15) is entitled "Necessity for control of holding companies." Following thereunder, subsections (a) (b) enumerate the possible evils of public-utility holding companies, and subsection (c) declares:

> "(c) When the abuses of the character above enumerated become persistent and wide-spread, the holding company becomes an agency which, unless regulated, is injurious * * *; and it is hereby declared to be the policy of this chapter * * * to eliminate the evils as enumerated * * *; and for the purpose of effectuating such policy to compel the simplification of public-utility holding company systems * * *, and to provide * * * for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter."

Section 79b (a)(7) then defines "holding company" as used in the Act to mean:

> "(A) Any company which directly or indirectly owns, controls or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company * * *, unless the Commission as hereinafter provided, by order declares such company not to be a holding company; and
>
> "(B) Any person which the Commission determines * * * to exercise * * * such a controlling influence over the management and policies of any public-utility * * * as to make it necessary or appropriate in the public interest * * * that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon holding companies * * *."

Thus Congress in the Holding Company Act laid down a clearly defined policy, and, as the Supreme Court said, the Act speaks for itself. *Electric Bond & Share Co. v. Securities and Exchange Commission* (1938), 303 U. S. 419, 438; 58 S. Ct. 678; 82 L. Ed. 936.

APPENDIX J

INTERSTATE COMMERCE COMMISSION

No. MC-F-2332

Burlington Transportation Company—Purchase—Chicago, Burlington & Quincy Railroad Company

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Submitted December 4, 1943 *Decided January 12, 1944*

Division 4, Commissioners Porter, Mahaffie and Miller

By Division 4:

"Burlington Transportation Company and the Chicago, Burlington & Quincy Railroad Company, both of Chicago, Ill., herein called vendee and the railroad, respectively, by joint application filed October 12, 1943, seek authority under section 5, Interstate Commerce Act, for the former to purchase certain motorbus operating rights and property of the latter for $300. The application is unopposed.

"Vendee has been under control of the railroad since its formation in 1929. • • •

"We find that purchase by Burlington Transportation Company of the above-described operating rights and property of the Chicago, Burlington & Quincy Railroad Company, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5(2)(a), and will be consistent with the public interest. • • •"

MAHAFFIE, *Commissioner,* concurring:

"Our approval of the instant application is construed in the dissent as a departure from the decision in *Refiners Transport & Term. Corp.—Purchase—Marshall,* 39 M.C.C. 271, because we do not require the Great Northern Railway Company and the Northern Pacific Railway Company, which companies together control the Chicago, Burlington & Quincy Railroad Company, to join in this application. The decision in the *Refiners case,* however, was based on that portion of section 5(2)(a) relating to acquisition of control by 'a person which is not a carrier.' The majority opinion of the court which set aside our decision in that case defined the issue as follows:

'The essential controversy is whether the statute is satisfied by securing the approval and authority of the Commission to consummate the sale upon the joint application of Transport and Refiners, or whether Union, as the owner of the majority of Refiners' stock, must also be joined in the application. The significance of the decision resides in the requirements of s.5(3) of he Act which subjects to the jurisdiction of the Commission any person, other than a carrier, who acquires control of a carrier with the approval of the Commission. • • •'

"In the instant case, no such question is involved; both the Great Northern and the Northern Pacific are 'carriers' as defined by the act."

PORTER, *Commissioner*, dissenting:

"In the case of *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M.C.C. 271, as I understand it, the entire Commission held that the application by Refiners to purchase Marshall Transport must be dismissed because the Union Tank Car Company, which owned 82.6 percent of Refiners capital stock and therefore controlled it, was a necessary party, and had not joined in the application.

"I dissented at some length in that proceeding for reasons which need not be repeated here, but suffice it for me to say, that I regarded it as wholly unnecessary, absolutely impossible of practical application, and certain to lead to absurd results, and not good law.

"Despite the fact that a District Court of the United States for the District of Maryland, composed of three judges, reversed the action of the Commission and held that Union was not a necessary party, we have continued, as a division, to follow the action of the Commission, pending an appeal to the Supreme Court.

"In the *Refiners case* the Commission in holding that Union should be made a party, did not go beyond the control of Union, but if that decision means anything, surely it is that having started to ascend the genealogical tree, we should climb until the branches are so dispersed that no one, or more acting together, has control.

"In this case, the Burlington Transportation Company is purchasing from its controller, Chicago, Burlington & Quincy Railroad Company, so that the Transportation Company's immediate controller is a party. We know, however, that the Chicago, Burlington & Quincy Railroad Company is in fact controlled by the Great Northern Railway Company and the Northern Pacific Railway Company.

If we are to be consistent and follow the Refiners decision, they are necessary parties to this proceeding and are not here. The case should be dismissed.

"True, this result is worse than silly, but it is the natural result of a bad decision."

APPENDIX K

PROVISIONS OF THE INTERSTATE COMMERCE ACT WHICH DEFINE AND LIMIT THE JURISDICTION OF THE COMMISSION OVER THE STOCKHOLDER OF A CARRIER

Section 204 (a) (7) of Part II of the Interstate Commerce Act:

"It shall be the duty of the Commission—

(7) For the purposes of the administration of the provisions of this part, to inquire into the management of the business * * * of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendation (including recommendation as to additional legislation) as the Commission may deem necessary."

U. S. Code Title 49, Sec. 304(a)(7).

Congress also provided in Section 220 (d) of Part II of the Interstate Commerce Act 320 (d) in the U. S. Code:

> "* * *. The Commission or its duly authorized special agents, accountants or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings or equipment of motor carriers, brokers and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence and other documents of any person controlling, controlled by or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transaction with such carrier."
>
> U. S. Code Title 49, Sec. 320(d).

pp. 2, 3, 6, 4, 5

SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1943.

The United States of America, Interstate Commerce Commission, Coastal Tank Lines Inc., et al., Appellants, *vs.* Marshall Transport Company, Warren C. Marshall, Refiners Transport Terminal Corporation.	Appeal from the District Court of United States for the District of Maryland.

[April 24, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

On an application to the Interstate Commerce Commission of two carriers by motor vehicle, appellee Refiners Transport Terminal Corporation and appellee Marshall Transport Company, for permission for Refiners to purchase the property and operating rights of Marshall, the Commission found that Refiners, the vendee-carrier, was controlled through stock ownership by a non-carrier, Union Tank Car Company, and that the proposed purchase would result in the acquisition by Union of control of the property and business of Marshall. Construing §§ 5(2)(a) and (b) of Part I of the Interstate Commerce Act, 24 Stat. 379, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. §§ 5(2)(a) and (b), as requiring the application to be made by Union, the non-carrier corporation controlling Refiners, the Commission denied the application of the carriers for lack of power in the Commission to approve the purchase.

The questions for our decision are (1) whether the acquisition of the property and franchises of one carrier by another, which is controlled by a non-carrier, involves the acquisition of control of the first or vendor-carrier by the non-carrier for which the Commission's approval is required by § 5(2)(a) of the Interstate Commerce Act; and if so (2) whether the Commission rightly held that under § 5(2)(b) of the Act it could not consider the propriety of the transaction in the absence of an application by the non-carrier for the Commission's authority to acquire control.

Appellee Refiners holds certificates of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier, by motor vehicle, of gasoline and petroleum products in Pennsylvania and eight of the central states. Re-

finers, as the Commission found, is controlled through ownership of 82.6% of its outstanding common stock by Union Tank Car Company, a non-carrier corporation. Marshall, a corporation, holds a certificate of public convenience and necessity under the grandfather clause, §206 of the Interstate Commerce Act, 49 U. S. C. §306, authorizing carriage, as a common carrier, of petroleum products, in bulk in tank trucks, over irregular routes in Maryland, Delaware, Pennsylvania, Virginia, and Washington, D. C. By their joint application Refiners and Marshall sought authority of the Commission under §5(2)(a) for Refiners to acquire by purchase the operating property and rights of Marshall.

After a hearing on the application, in which nine motor carriers, co-appellants here, appeared as protestants, and the Antitrust Division of the Department of Justice intervened, Division 4 of the Commission issued its report finding that the proposed purchase was within the scope of §5(2)(a) and (b) and would be consistent with the public interest. It overruled contentions of the protestants that the proposed purchase would result in the acquisition of control of Marshall by Union, the non-carrier, through its control of Refiners, the purchaser, so as to require that Union join in the application. 39 M. C. C. 93. On petition for rehearing the Commission reversed the holding of Division 4. It concluded that as Union, the non-carrier, already controlled one carrier, Refiners, the purchase of the property and business of Marshall by Refiners would result in their control by Union, and that under §§5(2)(a) and (b) and related sections this could not be done without an application by Union for the Commission's authority to do so. 39 M. C. C. 271.

Union having failed to apply for that authority within the twenty days allowed for that purpose by the Commission's order, the Commission dismissed the pending application of Refiners and Marshall. Upon the suit of appellees the District Court for Maryland, three judges sitting, set aside the Commission's order, Circuit Judge Soper dissenting, 52 F. Supp. 1010, and the case comes here on appeal under 28 U. S. C. §§47(a), 345.

Section 5(2)(a) of the Act, makes it "lawful, with the approval and authorization of the Commission . . : for two or more carriers to consolidate or merge their properties or franchises . . . into one corporation for the ownership, management, and operation of the properties theretofore in separate ~~management~~ ownership; or for any carrier . . . to purchase . . . the properties . . . of another;

. . . or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise".

Section 5(2)(b) provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority thereunder shall present an application to the Commission. . . ." And § 5(3) provides that "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to" specified provisions of the Act, relating mainly to the keeping of accounts, the making of reports, access to records, the issuance of securities and the assumption of liabilities.

Section 5(4) makes it "unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of . . . a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

In determining whether, under the non-carrier control clause of § 5(2)(a), Union, the non-carrier here, is required to file an application with the Commission, the issue turns on the questions whether, within the meaning of the statute, Union is by the proposed transaction attempting to "acquire control" of Marshall and, if so, whether Union is within the requirement of § 5(2)(b) that the person seeking the authority of the Commission to acquire such control shall present his application to the Commission. In answering these questions the District Court thought that the several instances specified by § 5(2)(a), in which the Commission is authorized to permit acquisition of carrier control, are separate and independent of each other so that, the Commission having full authority to authorize Refiners to purchase Marshall under the merger and purchase provisions of § 5(2)(a), its authority in that respect is not limited or superseded by the non-carrier control provision appearing later in the subparagraph and that provision is therefore inapplicable.

In any case the District Court concluded that these provisions are permissive only, giving the Commission authority to act with respect to any one without regard to the restriction imposed by any other. Since Refiners' and Marshall's application to the Commission for approval of Refiners' purchase of Marshall's property and operating rights are within the permissive authority of the Commission under the purchase provision of § 5(2)(a), the Court thought that it was not necessary for Union to comply with the non-carrier provision and with the requirement of § 5(2)(b) by joining in the application even though the non-carrier provision would otherwise be applicable to the transaction.

But this overlooks the fact, which the Commission thought controlling, that the present transaction may fall within both the purchase provision and the non-carrier control provision of the statute since it involves not only the purchase of Marshall by Refiners but also the acquisition of control of Marshall by Union, through its control of Refiners. The question then is not whether the non-carrier control provision limits or supersedes the purchase provision but whether, as the Commission thought, both apply, and if so the extent to which they restrict the Commission's authority to approve the acquisition of control by a non-carrier which has not filed an application pursuant to § 5(2)(b).

As a matter of statutory construction it does not follow that such parts of the proposed transaction in this case as are subject to the requirement of the non-carrier control provision can escape that requirement because the transaction also involves a purchase which falls within and satisfies the requirement of the purchase provision of the statute. Section 5(4) prohibits each of the transactions enumerated in § 5(2(a) unless approved by the Commission. And it is plain that if the proposed transaction involves Union's non-carrier control of Marshall within the meaning of § 5(2)(a), appropriate application to the Commission for its approval must be made in conformity to § 5(2)(b). Hence our inquiry must be directed to the nature of the requirement of the non-carrier control provision of the statute and to the question whether if applicable it is satisfied by appellees' application to the Commission in which the Union did not join.

It is not doubted that if Union, having control of Refiners, sought to acquire stock control of Marshall, Union would be required by § 5(2)(b) to apply for the Commission's authority to do so. But it is said that having control of Refiners, Union may, by procuring Refiners' compliance with the purchase provisions

of the statute alone, extend its control indefinitely to other carriers merely by directing the purchase of their property and business by Refiners, without subjecting itself to the jurisdiction of the Commission as provided in § 5(3), so long as Union does not act directly as the purchaser of the property[1] or of a controlling stock interest in such other carriers.

We think that neither the language nor the legislative history of the statute admits of so narrow a construction. Section § 5(4) makes it unlawful, without the approval of the Commission as provided by § 5(2)(a), for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Not only is this language broad enough in terms to embrace the acquisition of control by a non-carrier through the purchase, by a controlled carrier, of the property and business of another carrier, but the legislative history indicates that such was its purpose.

Congress, by § 407 of the Transportation Act of 1920, 41 Stat. 480, amended the Interstate Commerce Act so as to provide in § 5(2) that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by lease or purchase of stock; by § 5(8) the carriers affected were relieved from the operation of the antitrust laws, and by § 5(6) the Commission was authorized upon special conditions to approve the actual consolidation of rail carriers. By the 1933 amendment of § 5(2), 48 Stat. 217, the Commission was given further authority to permit unified control of two separate carriers "through ownership of their stock" and in 1940, § 5(2)(a) was amended to read as at present by the addition of the words "or otherwise" to the phrase last quoted, and the section was made applicable to motor carriers, 54 Stat. 905. Section 1(3)(b) of the Act as amended in 1940 declares that "control" "shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control".

The Conference Committee Report on the Transportation Act

[1] Such an acquisition of operating property, whether or not within § 5(2)(a), would render the acquiring corporation an operating carrier within §§ 203(a)(14)-(16) subject as such to the jurisdiction of the Commission under Part II. Similarly the transfer of the carrier's operating franchises would be subject to the Commission's jurisdiction under § 212(b).

of 1940, H. R. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63, points out that this definition of "control" was added in order to make applicable to specified sections of the Act, including § 5, the benefit of the interpretation of this Court in *Rochester Telephone Co.* v. *United States*, 307 U. S. 125, 145-6, of the similar definition of "control" in § 2 of the Communications Act of 1934, 48 Stat. 1065, 47 U. S. C. § 152(b). In that case this Court had emphasized the breadth of the statutory language as embracing every type of control in fact. It had declared that the existence of control must be determined by a regard for the "actualities" of intercorporate relationships and that the Commission's determinations of fact, if warranted by the record, were conclusive.

Here the statute has declared that the non-carrier control to be approved by the Commission is control through stock ownership "or otherwise". § 5(2)(a). It has in the broadest terms prohibited the effectuating of "control or management . . . however such result is attained, whether directly or indirectly by common directors, officers or stockholders, a holding or investment company . . . or in any other manner whatsoever," § 5(4). "Control or management" is defined to include "the power to exercise control or management". § 5(4). The control or management whose acquisition is prohibited unless the approval of the Commission is secured is that which is obtained "in any . . . manner whatsoever" "however such result is attained, whether directly or indirectly", § 5(4). It includes "actual as well as legal control", § 1(3)(b), and "the power to exercise control or management," § 5(4).

Appellees argue that the Commission, in finding that the proposed purchase of the property and franchises of Marshall would be an acquisition of "control" requiring the Commission's approval under §§ 5(2)(a) and 5(4), disregarded the words of the statute which speaks only of acquisition of control of another "carrier", defined in § 1(3)(a) as a "person, natural or artificial", and not of acquisition of control of its property. But such a literal interpretation of the statute ignores its essential object. What § 5(4) read with § 5(2)(a) prohibits, unless authorized by the Commission, is the merger by two or more carriers of "their property or franchises . . . into one corporaton for the ownership, management and operation of the properties theretofore in separate ownership", and the acquisition by a non-carrier, having control of one carrier, of control of another, or the effectuating in any other manner of "the control or management in a common interest of any two or more carriers".

The statute is thus concerned, not merely with the acquisition of control of one corporation by another, but with the acquisition of control of a corporation which is doing the business of a carrier, because such control is in effect control of its carrier business. Control of that business, which may be effected by stock ownership, may also be "otherwise" effected through a contract of a controlled carrier to purchase the business of the other carrier, if the purchase receives the approval of the Commission. The power thus acquired over the vendor-carrier by the contract of purchase is the power "to exercise control or management" over its carrier business which, under § 5(4), can become effective only with the approval of the Commission. As the Commission pointed out in its report, there can be no more direct or positive manner of obtaining control than by outright purchase of another carrier's business and property and the purpose of the Act would be defeated if outright purchase, through the medium of a controlled subsidiary carrier, of another carrier's property and operating rights, were exempted, while control by purchase of stock of the other carrier through the same subsidiary remained within the Act.

The Commission also emphasized the fact that, as the motor carrier business is now organized, purchase of the assets and franchises of carriers would be the usual and in many cases the only feasible method of acquiring control of them. It pointed out that many of the businesses are owned by individuals or partnerships, often possessing extensive operating rights. In the case of corporations their stock is usually closely held and they are without outstanding long-term debt obligations. In all these cases a simple and usual method of acquiring control of other carriers is by the cash purchase of their assets and operating rights and the assumption of their liabilities followed by liquidation of the vendor. The Commission concluded, "Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of 'control' as used in the act". 39 M. C. C. at 275. For the reasons which we have stated we think the Commission's construction of the Act in this respect is correct.

The question remains whether the Commission had authority to proceed in the absence of any application by Union. By § 5(4) any transaction within the scope of subparagraph (a) of paragraph (2) is unlawful except as provided by that paragraph, which includes subparagraph (b). Section 5(2)(a), read with § 5(4),

requires the acquisition of control to be with the approval of the Commission. And § 5(2)(b) requires the "person" seeking authority for a transaction covered by subparagraph (a), here the non-carrier control of Marshall, to present an application to the Commission. The Commission may approve the application "subject to such terms and conditions and such modifications as it shall find to be just and reasonable". The purpose of these provisions of §§ 5(2)(b) and 5(4) is apparent when they are read with § 5(3), which authorizes the Commission, by its order permitting non-carrier control, to require such non-carrier to be considered a carrier subject to the Act to the extent provided in the order made in conformity to § 5(3).

The control over the non-carrier contemplated by § 5(3) can be acquired only if the non-carrier subjects itself to the jurisdiction of the Commission by filing its application with the Commission for its approval of such non-carrier control as is provided by § 5(2)(b). The purpose of § 5(3) to subject the non-carrier, thus acquiring control, to specified provisions of the Act would be defeated if the non-carrier were not to become subject to the Commission's order. That is avoided by making it unlawful to acquire non-carrier control save on the non-carrier's application to the Commission in conformity to § 5(2)(b). As appellees' application to the Commission involved the acquisition of non-carrier control of Marshall by Union, Union was a person seeking authority for such control and as such was required by § 5(2)(b) to make application to the Commission. To approve the transaction involving such non-carrier control without the application of the non-carrier would be to authorize Union's non-carrier control of Marshall without subjecting the former to the Commission's jurisdiction as required by § 5(3).

The Commission rightly concluded that it was without authority to approve such control unless Union, the non-carrier, filed its application with the Commission, and since Union failed to do so within the time allowed by the Commission's order, the Commission properly dismissed the pending application in which Union had failed to join. It was therefore error for the District Court to set aside the Commission's order, and the judgment of the District Court is

Reversed.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed for the reasons given by the District Court.